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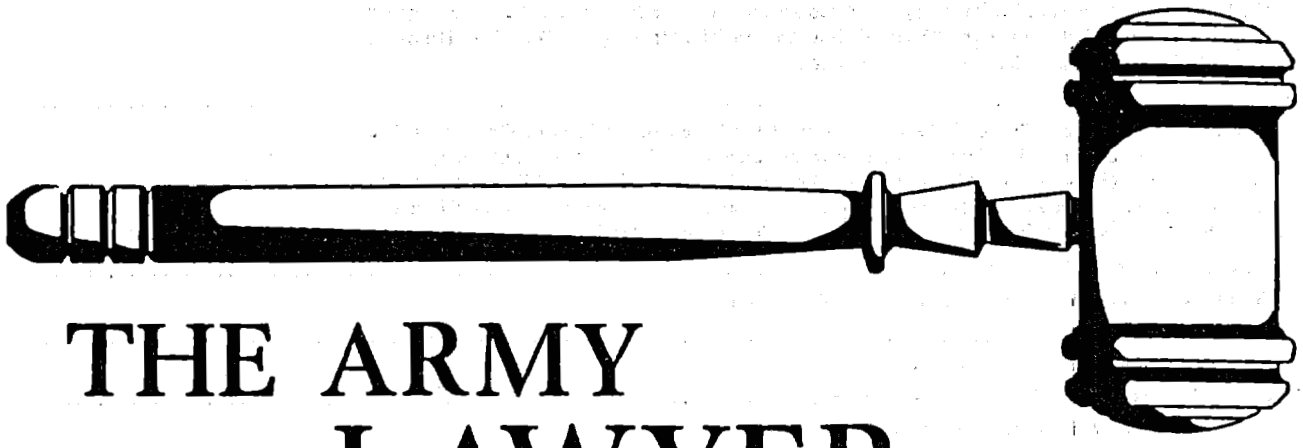

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The Commander and Environmental Compliance

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Introduction[1]

The rise of the environmental movement in this country is perhaps the most significant and influential legacy of the 1980's. A by-product of this grass roots movement is the detailed scrutiny to which the public now subjects federal agencies in regard to environmental compliance. Along with the rise in public concern has been intensified attention from Congress and state officials. These concerns have crystallized into a large body of environmental laws and regulations. The perception of many within these political forces is that the defense establishment is not complying with environmental requirements—in other words, that we are breaking the law!

Our chain of command has spoken regarding this perception of widespread violation. Secretary Cheney, in a memorandum to the service secretaries, recently emphasized that compliance must be a command priority at all levels. He went on to say, "I want every command to be an environmental standard by which Federal agencies are judged.... We need the right people at the right place with the right training."[2] The Secretary has also promulgated a new environmental ethic for the Defense Department. That ethic is expressed in three words—*compliance* with the law, *responsibility* as careful stewards of vast natural resources, and *cooperation* with federal, state, and local regulators.[3]

At most installations, environmental compliance presents a greater challenge than almost any other issue the commander faces. Additional "players" are on the scene who are usually absent from most other areas in which a commander operates. These "players" are the regulators (both federal and state), the local governments, and the local populace, especially those organized in environmentally-oriented groups. Each group has its own "levers and hammers." Dealing with these forces is usually a new experience for the commander and, at times, can be terribly frustrating.

The fundamental reason for this state of affairs is a drastic change in the traditional sovereign immunity that the United States typically enjoys under the law. In most instances federal activities cannot be regulated by the state or local governments. This basic principle of law stretches back to the earliest days of our constitutional framework. In the case of *McCulloch v. Maryland*[4] the Supreme Court, led by Chief Justice John Marshall, held that the Bank of the United States, as an instrumentality of the federal sovereign, could not be regulated by the states. However, Congress has waived much of this traditional immunity in the environmental area. For example, the Clean Water Act provides that federal departments "shall be subject to, and comply with, all Federal, State, interstate, and local requirements ... respecting control and abatement of water pollution";[5] the Clean Air Act requires that federal departments "be subject to, and comply with, all Federal, State, interstate, and local requirements ... respecting the control and abatement of air pollution";[6] and the Solid Waste Disposal Act requires that federal departments "be subject to, and comply with, all Federal, State, interstate and local requirements ... respecting control and abatement of solid waste or hazardous waste disposal."[7]

The clear congressional trend is the enactment of more onerous measures to force environmental compliance on federal facilities. For instance, H.R. 1056[8] would allow fines to be assessed against the government for violating solid or hazardous waste standards. This bill, if it becomes law, would put the regulators in the "drivers seat" to

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[1] This article was developed from a speech that Brigadier General Fugh delivered at the DOD Eastern Regional Commander's Conference in Destin, Florida, on March 7, 1990.

[2] Secretary of Defense Memorandum for the Secretaries of the Military Departments, subject: Environmental Management Policy, 10 Oct. 1989.

[3] Remarks by Secretary of Defense Dick Cheney to the Western Association of Attorneys General, 4 Aug. 1989; printed as "The DoD Environmental Ethic," in Defense Issues, Vol. 4, No. 32.

[4] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[5] 33 U.S.C. § 1323(a) (1982).

[6] 42 U.S.C. § 7418(a) (1982).

[7] 42 U.S.C. § 6961 (1982).

[8] H.R. 1056, 101st Cong., 1st Sess. (1989).

determine a commander's budgetary and mission priorities.

As demonstrated by the Aberdeen Proving Ground case, one of the most extraordinary legal growth areas has been environmental criminal law. The Justice Department now has twenty full-time lawyers working on such prosecutions, backed up by U.S. Attorneys and FBI agents across the nation, plus fifty criminal investigators at the Environmental Protection Agency. In the past few years, the Justice Department's special environmental unit has obtained more than 400 settlements or convictions against individuals and corporations, yielding fines of $26 million and prison sentences totaling 270 years.[9]

The message is simple—environmental compliance is a mission that must be accomplished. There is no excuse for doing nothing or staying out of compliance.

Common Environmental Compliance Problems

The goal of environmental compliance is not always simple to attain. The requirements are often detailed, open to a wide range of interpretation based on subjective determinations, and differ from state to state. Environmental media—air, water, and solid waste—are generally the subject of different regulatory programs, often overlapping, and regulators sometimes have jurisdictional disputes.

A commander must be aware that there are several areas that could cause problems with the environmental overseers. These areas are the installation's current operations, historical operations, training activities, and construction/demolition activities. Each of these areas has a significant potential for environmental compliance problems.

Every installation commander is aware of the need to be informed of current installation operations. But how many commanders know which installation operations require permits from the regulators? For example, if the installation has a boiler heating plant, air emissions permits are normally required. Depending upon the general air quality in the area, application of more stringent emissions controls may be required. Permits are issued for a fixed period of time and normally include "reopener" provisions. These provisions give regulators the right to institute proceedings requiring modifications during the permit period. Retrofitting controls on older equipment can be very expensive. The regulators may require new equipment to be installed. Recognize that any or all of these options can be directed by the regulator without regard to the commander's planning or budget concerns. Failure to comply with the permit may result in shutting down the noncomplying operation, modifying the operation, or attempting to impose fines against the installation. The regulators are more prone to come after federal facilities because of our poor compliance record. Also, they believe that the economic impact of shutting down our installations is relatively mild as compared to the impact of shutting down a corporate facility. Commanders need to ensure that environmental permits are current, all appropriate activities are covered, permit conditions are met (or appropriate modifications sought), and deficiencies noted during inspections are promptly addressed.

Historical operations, or activities that are no longer ongoing, create a different set of problems. Any installation that has engaged in manufacturing industries or related operations is a prime candidate for an environmental audit. If demilitarization or disposal activities took place at the installation, chances are that some contamination remains that requires cleanup. If installation operations had been terminated on short notice, such as calls for demobilization after the Korean or Vietnam wars, it is likely that materials were improperly stored or disposed of. If portions of the installation were leased to private concerns, their activities may have resulted in pollution that will require action.

When the historical record raises environmental concern, it is important for the commander to determine what knowledge exists and what knowledge can be developed concerning past activities. The installation may be a candidate for action under the Defense Environmental Restoration Program. For the Army, this program is managed by the U.S. Army Toxic and Hazardous Materials Agency (USATHAMA). It has a broad range of expertise in environmental remediation to assist Army installations.

Training requires specific actions and gives rise to other environmental concerns. The intended use of land, particularly off base, may require documentation under the National Environmental Policy Act (NEPA). Under the NEPA process, the commander must assess the potential impacts of the training on or near the installation. Some restrictions or mitigation actions may be required in order to conduct the training. Permits may also be required.

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[9] Recent examples of cracking down on major polluters—

United States v. Ashland Oil, No. 88-146 (W.D. Pa. filed Sept. 15, 1988): One violation under the Clean Water Act and one violation under the Rivers and Harbors Act. Fine: $2.25 million. This fine was adjudged in addition to the previously assessed state civil penalties of $4.6 million and up to $30 million required for settlement of a private class action suit, *In re* Ashland Oil Spill Litigation, No. M14670 (W.D. Pa. filed Nov. 7, 1989).

United States v. Texaco Inc., No. CR 88-954-DK (C.D. Cal. filed Dec. 12, 1988): Two violations under the Outer Continental Shelf Lands Act. Fine: $750,000.

United States v. Ocean Spray Cranberries, Inc., No. 88-13-N (D. Mass. filed Dec. 20, 1988): Twenty-one violations under the Clean Water Act. Fine: $400,000.

United States v. Exxon Corp., No. A90-015 CR (D. Alaska filed Feb. 27, 1990): Accused of one violation each under the Clean Water Act, the Refuse Act, the Migratory Bird Treaty, the Ports and Waterways Act, and the Dangerous Cargo Act. Potential fine: $700 million.

Regulators have become increasingly interested in military training. The latest example of this growing trend is a state agency's attempt to regulate the burning of excess artillery propellant bags during firing exercises. Flying is commonly restricted because of concerns over aircraft noise. Laundering may require permits for discharging water in field environments. Equipment such as smoke generators may require air emissions permits. Training may be greatly restricted, on and off base, because of the presence of endangered species or their habitat.[10]

Construction or demolition typically require the preparation of NEPA documentation before they can be conducted. The NEPA process may identify concerns that cause the project to be modified or even cancelled. The presence of wetlands may also require project changes. Demolition may involve the removal of asbestos, a material heavily regulated by federal and state agencies. Property that is designated as historic or culturally significant may be protected from alteration. In one instance, local citizens attempted to have some World War I barracks declared historically significant to prevent their demolition and replacement with modern barracks. They apparently were concerned with the possibility of increased military training on the installation.

In a case where an environmental violation is discovered, a commander's options are limited to the following alternatives:

- immediately come into compliance;
- shut down the offending facility;
- negotiate an agreement with the regulator for coming back into compliance; or,
- seek a Presidential exemption if sufficient funds have been previously requested (a "nonstarter" in peacetime).

Note that doing nothing (and remaining out of compliance) is clearly not an option.

Installation Environmental Resources

To whom does the commander look for assistance in achieving full environmental compliance? The commander should use a team approach in managing environmental issues. Team members should include the environmental coordinator, safety officer, lawyer, preventive medicine officer, public affairs officer, and land manager. The two key players at the installation are the environmental coordinator and the lawyer.

The environmental coordinator is usually responsible for all permitting and reporting. This person is a critical component of the installation staff. An installation's environmental well-being depends on how well this person works with the regulators and others on the installation staff. Needless to say, this individual must be properly trained and graded. The environmental coordinator is too important to bury within the installation organizational structure. The Commander of Aberdeen Proving Ground, in an effort to deal with the serious problems of that installation, requires the environmental coordinator to report directly to him. This person, at a minimum, should report directly to the Director of Engineering and Housing (DEH). Keep in mind that the environmental office must deal with areas that are beyond the scope of routine DEH activities, particularly training. The commander must establish and maintain a relationship with the environmental coordinator, and this person must have ready access to the commander.

The Army is training more environmental lawyers in response to the changing times. Each installation legal office has an environmental law specialist (ELS). With the creation of the Environmental Law Division in the Office of The Judge Advocate General in October 1988, more training opportunities and information have become available to these attorneys in the field. The ELS needs to work closely with the environmental coordinator on the installation.

Actions That Should be Taken by the Installation Commander

The installation commander must be a strong, highly visible presence in matters of environmental compliance. There is no substitute for command emphasis, and there is a definite need to stress that the commander will not tolerate inattention in achieving and maintaining full compliance. This is serious business that sometimes requires serious changes in programs, activities, and attitudes.

Upon assuming command, the commander should conduct a preliminary inquiry into the status of the installation's environmental compliance program. The commander should:

- determine whether there are any outstanding notices of violation (NOV) issued against the facility and what NOV's have been resolved in the recent past.
- determine whether the installation is operating under any compliance orders or compliance agreements. If so, specified actions must be carried out on a defined schedule and penalties may be stipulated for noncompliance.

[10]E.g., the desert tortoise at the National Training Center, Fort Irwin, California, and the red cockaded woodpecker at Fort Bragg and Fort Benning.

— review the status of budgeting for environmental compliance. Specifically, the commander should ensure that sufficient funds were requested for the priority environmental requirements identified in the installation's most recent OMB A-106[11] submission (Form 1383).

— determine what kind of working relationship exists between the installation and the regulators. If the environmental coordinator does not know who monitors the installation's permits, he needs to find out and establish a working relationship with them.

— know what projects are scheduled and underway and what NEPA documentation has been completed.

— find out when the last environmental audit was conducted on the installation, what deficiencies were found, and the remedy for the deficiencies.

— determine what hazardous waste is generated on the installation and what permits the installation has.

— be informed of the methods of hazardous waste disposal that are underway, of any problems in this area, and of the costs of that disposal.

— find out the state of training of those who handle hazardous waste.

— determine what efforts are underway to minimize the generation of hazardous waste and their effectiveness.

The key to avoiding environmental problems is to recognize the reality of the threat. Every commander should tour the installation to observe ongoing activities that may affect environmental compliance. When inspecting motor pools, it is important not only to check on the maintenance statistics and equipment, but also to observe where the used oil is stored and how it is handled. The use of degreasing agents and their disposal should be inspected. Hazardous waste storage should be inspected. Many of the regulatory requirements for these facilities are based on common sense good housekeeping practice. If the place looks messy or disorganized, if it appears that a leak would not be contained, or if it is hard to determine if any drums may be leaking because of the way they are stored, the place is probably out of compliance and thus vulnerable to an NOV from a regulator. Deficiencies should be noted and corrected, and a record should be made of the corrections. Remember, the commander is usually the permit holder for the installation. He is the primary focus for compliance and is accountable to the regulators.

Tenant activities can be a major concern in achieving compliance. Normally, the installation, not the tenant, is the permit holder. This situation may cause the tenant to have a reduced awareness of existing environmental requirements. The installation environmental coordinator needs to work directly with the tenant counterpart. If concerns develop or persist over environmental compliance, the installation commander must address them with the tenant commander. Any unresolved differences must be escalated promptly up the chain of command for a swift decision.

The installation commander should strive to meet the regulators. Just as a new commander routinely meets with local officials, why not include the appropriate officials from the various regulatory agencies? The appropriate EPA regional federal facilities coordinator is a must. So are the appropriate officials responsible for issuing permits to the installation.

Resources Available to the Commander

The commander can obtain assistance from a wide array of resources within the defense establishment. For example, an excellent reference is the "Commander's Guide to Environmental Compliance" published by USATHAMA. The "Environmental Review for Management Action Checklist," published by the Corps of Engineers' Construction Engineering Research Laboratory, is another excellent source of information.

Major commands normally have resources with a wide range of environmental experience that can provide both technical and legal assistance to installations. In the Army, USATHAMA and the Army Environmental Hygiene Agency are available to provide technical assistance. The Army Environmental Office in HQDA provides guidance on policy issues and on other environmental matters. The Environmental Law Division, Office of The Judge Advocate General, is available to provide legal advice.

Conclusion

The commander's problem of attaining environmental compliance is not a passing issue that will soon go away. The public's concern over environmental compliance is a legitimate one. Compliance is a matter that cuts across everything we do, in both public and private sectors. It is a national concern that will continue to receive the attention of our elected and appointed officials. Until we fully comply, we are vulnerable. Critical mission activities will suffer and may even be halted. Civil and criminal sanctions against us are real possibilities.

Installation commanders face an ever increasing challenge as they deal with the environmental issues of the future. The Army is organizing to face these challenges and to help the commander in meeting the environmental cost of doing business.

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[11]Office of Management and Budget Circular No. A-106, Reporting Requirements in Connection With the Prevention, Control, and Abatement of Environmental Pollution at Existing Federal Facilities (Dec. 31, 1974).

Memorandum From the Commander of the U.S. Army Corps of Engineers

The following is a memorandum from Lieutenant General Hatch, Commander of the U.S. Army Corps of Engineers, concerning environmental engineering. The memorandum provides guidance on environmental matters to the Army Corps of Engineers. It demonstrates the commitment being made by the entire Department of Defense to integrate a new environmental ethic into every aspect of DOD business.

14 February 1990

MEMORANDUM FOR

Commanders, Field Operating Activities
Assistant Chief of Engineers
Directors, HQUSACE
Chiefs, Separate Offices, HQUSACE

SUBJECT: Strategic Direction for Environmental Engineering

1. The Army Corps of Engineers is entering an exciting new decade as we witness the greatest changes in the international order in years, perhaps our lifetimes. It is a time to reflect on our 200-year tradition of service and prepare ourselves for yet greater service in the nineties and beyond. This letter focuses on what I believe will be our greatest challenge, opportunity, and growth area. While the emphasis on various components of our national security and our Nation's well-being are changing, one element emerges in relative importance—not only in the United States, but throughout the world—our environment.

2. We in the Corps are justly proud of our role in developing and defending our Nation in the last two centuries and of our response and adaptation to a growing national concern for environmental values. In this era of ever increasing change, "response and adaptation" are not adequate for contemporary needs. The present lead times involved in changing the direction of our institution with the momentum of our legal, regulatory, cultural and budgetary bases for conducting our business are just too long. We must establish a new strategic direction that will guide current and future changes in all aspects of our program, civil and military. These changes will be fully consistent with Administration policy and in accordance with both the spirit and the letter of the authorizations provided by Congress.

3. The National Environmental Policy Act (NEPA) remains our broadest guide for action. Twenty years ago, the President and the Congress declared that it was the continuing policy of the Federal Government to use all practicable means, "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." (NEPA, Section 101) President Bush and Secretary of Defense Cheney have specifically declared their dedication to a sound environment. President Bush, for example, in a speech to the United Nations on 25 September 1989, identified the environment along with economic and security issues as *the* top global challenges of the 21st century. It is increasingly clear that our security relies on a healthy natural resource base. On 10 October 1989, Secretary Cheney stated his vision for how the Department of Defense would meet the environmental challenges it faces. He called on the DOD to be the "federal leader in agency environmental compliance and protection" and to be committed "to meet the worldwide environmental challenge." Therefore, to meet our Nation's and the world's needs, an environmental ethic must be an integral part of how we conduct our business. It is the Corps' obligation to protect and restore environmental quality while contributing to social and economic well-being.

4. In practical terms, embracing and promoting our environmental ethic and spirit will change the way we do our traditional business and work for other agencies. As our history demonstrates, we have a unique tradition and capability to solve engineering, environmental and developmental problems facing the Nation and the global community. The anticipation and prevention of environmental damage will continue to require that the ecological dimensions of a project, a policy, or a federal action be considered at the same time as the economic, social, and engineering considerations; however, the weight we give to environmental consequences will increase. Proposed development or action will attempt first to avoid adverse impacts, then minimize or reduce them, and finally compensate for unavoidable effects over the life cycle of the project or action. Simply put, the environmental aspects of all we do must have *equal* standing among other aspects—not simply a "consideration," but part of the "go-no-go" test along with economics and engineering.

5. President Bush has stated that we will protect and preserve wetlands and adopt a no net loss of wetlands policy. We will wholeheartedly support the President's wetlands initiative (to the full extent of our authorizations) in our project planning, our operations and maintenance activities, our military programs, and our regulatory program. In doing this, we will also strive to protect other precious natural resources, including valuable agricultural lands. While our current programs already

provide essential protection for our water resources and wetlands, I am committed to strengthening them and using the regulatory program, within legal and policy bounds, to protect wetlands from unnecessary destruction or degradation.

6. In our military program, the land, water, and natural resources made available to the Army are limited and must be carefully managed to serve the Army's short and long term needs. Embracing an environmental ethic and applying this ethic to our stewardship of our natural resources is vital and will be an important ingredient in supporting our Army. Environmental leadership and a commitment to go "beyond compliance" must be the standards upon which our service to the Army is measured.

7. Our work, military, civil, and support for others, depends on creative, environmentally sensitive engineering. We must look at our work in a broad social and environmental context, as well as in technical and economic terms. Decision makers (our higher authorities, project partners, and customers) need to be aware of the regional and life cycle consequences of each possible solution we recommend. We must plan wisely at the outset and integrate environmental concepts with engineering creativity in all phases of our projects and activities. We will not only mitigate environmental impacts of development, but, when authorized to do so, we will expand our work that directly addresses environmental problems as a central purpose of the engineering effort. We will continue to consider both structural and nonstructural solutions in solving problems and in protecting and restoring our environment. All of this will depend on our continuing to develop the requisite environmental engineering talent.

8. We have already realized the opportunities environmental engineering brings to the Corps. For example, we are investing nearly $500 million annually in solving environmental problems in the area of hazardous and toxic waste. Restoration of contaminated sites is and will continue to be a significant environmental issue facing the DOD, EPA, DOE and other agencies. This challenge requires engineering capabilities that Army Engineers have demonstrated in EPA's Superfund and the Defense Environmental Restoration Programs. Environmental engineering and supporting research and development account for nearly three quarters of a billion dollars of our FY '91 budget—military, civil, and support for others.

9. Among all agencies whose primary reason for being is not environmental protection, you have been leaders in integrating and embracing environmental values—with your continued efforts we will build on that leadership. It is especially important to forge new partnerships with the total environmental community and other resource agencies as well as with those who pursue development. We can learn much from one another, and I challenge you to engage in continuing dialogues among these diverse interests.

10. Thanks to the visionary, pioneering efforts of our predecessors, we have a good story to tell about the environmental value we have designed and built into many of our projects; the aggressive research and development we have conducted to enhance the environmental aspects of our efforts; and the environmental protection achieved through our regulatory program. In more recent years, we have intensified our environmental focus in research and development, civil works, military, and support for others programs. Now, I believe our Nation asks more of us. Yes, we must continue the good work we have begun but we must also enhance the environmental aspects of our basic missions. We must be capable and willing to respond to new missions that feature solving environmental problems just as we have for navigation, flood control, military construction, etc.

11. I recognize that until we have included changes in the vast body of guidance that directs our actions, there may be a frustrating gap between our words and our deeds. For example, we will explore updating the principles and guidelines that are the basis for water resource project formulation. Bear with me in this transition.

12. Finally, I ask each member of the Corps to integrate environmental sensitivity into our day-to-day business. The cumulative consequences of our work must reflect a clear interest in protecting the quality of our environment and natural resources—we will be measured by what we do, not what we say. Our commitment must be to environmentally sustainable development in which we do not compromise the future while we meet current needs. Now is the time to use our engineering, scientific and management capacity to advance our Nation's environmental goals. We recognize that sustaining the environment is a necessary part of building and securing this Nation.

H.J. HATCH
Lieutenant General, USA
Commanding

Article 31(b) and the Defense Counsel Interview

Major John B. McDaniel
Contract Appeals Division, USALSA

Editor's Note—A judge advocate recently requested an advisory opinion on the same issue that is presented in this article. The Executive, OTJAG, referred the request to the Professional Responsibility Committee, which is presently considering the issue. This article, however, represents the author's personal opinion. The opinion of the committee will be published in a future issue of The Army Lawyer.

The Problem: A Not So Hypothetical Hypothetical[1]

You are a defense counsel at a major installation. Your client, Specialist X, is charged with larceny of government ammunition and aggravated assault with a firearm. According to the CID report, X confessed to taking government ammunition with him on an overseas deployment, where he became involved in a mock firefight with aggressor forces played by American soldiers assigned to another unit. During the firefight, he loaded a magazine of live rounds in his M-16 and, with his next burst of fire, blew the blank adapter off the weapon, shooting an aggressor in the groin and almost killing him. About the only good thing in the confession from the defense perspective is that he denied the shooting was intentional.

X has an impeccable record and, but for this one incident, seems like a truly good soldier. He feels very bad about the shooting, and you suspect that he did not really steal any ammunition. You conclude that he may have been covering up for someone when he made his statement to CID. Finally, two days before trial, X tells you that his squad leader, Staff Sergeant Y, gave him a magazine of live rounds the night before the shooting.

Despite the fact the battalion commander had issued strict orders against carrying live ammunition on exercises, X believes carrying live rounds on exercises was a fairly common practice in his unit. X is certain that Y knew of the commander's policy. X also thinks that during shakedown inspections Y routinely covered up for squad members who carried live ammunition.

Your situation is clear. Evidence of SSG Y's conduct will exculpate X of the charge of stealing ammunition. It arguably will also reduce the criminality of the aggravated assault charge; at the very least, it should mitigate the sentence your client will receive for the shooting.

You decide to interview SSG Y and determine how much, if anything, he will admit to. You phone X's orderly room and SSG Y happens to answer the phone. Because you have already interviewed him as a witness for the sentencing phase, he is not surprised when you ask him if he would be willing to come over to your office to talk some more about X's case. No sooner have you hung up the phone than you are struck by an unsettling thought: you want to ask Y about the ammunition he gave X and about the unit's policies and practices regarding ammunition in general, but you now suspect Y of several crimes.[2] Should you read him his rights before asking him any questions?

The Statute

Article 31(b) of the Uniform Code of Military Justice states:

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.[3]

A literal reading of the statute would seem to indicate that the statute applies to the military defense counsel interviewing a witness whom he suspects of an offense. The legislative history of the provision, however, gives no indication that Congress intended it to apply to the defense counsel interviewer.[4] Indeed, there is no indication that Congress ever contemplated such a situation. Moreover, statutes are often construed contrary to their

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[1]The facts of this hypothetical are based loosely on the facts of a case tried by the author as trial counsel in 1985.

[2]At a minimum, Y appears to have willfully disobeyed the commander's order not to carry live ammunition on field exercises (a violation of article 90 or 92, depending upon the facts) and to have been derelict in his duty as squad leader insofar as he transferred the ammunition to X in violation of the commander's order (article 92). He also may be guilty of larceny or wrongful appropriation of government ammunition (article 121). If he rendered false reports during shakedown inspections for ammunition, he may have made false official statements (article 107). Finally, if Y knowingly transported stolen ammunition across a state or international boundary in order to get to the deployment area, he may have violated 18 U.S.C. 922(i) (1982).

[3]Uniform Code of Military Justice art. 31(b), 10 U.S.C. § 831(b) (1982) [hereinafter UCMJ].

[4]The legislative history reads as if the only situation contemplated is the prototypical official investigation conducted either by military law enforcement personnel or by representatives of the command concerned, such as the Inspector General. *See Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. 983-92 (1949) [hereinafter House Hearings].

actual wording when a literal reading would be inconsistent with legislative intent.[5]

The Cases

Not surprisingly, all of the reported cases dealing with the issue of the applicability of article 31(b) to defense counsel arise (following our hypothetical designations) in the context of the subsequent prosecution of Y, not the antecedent prosecution of X. As a result, their focus generally is on whether Y's unwarned statement may later be used against Y;[6] the usefulness of such opinions in deciding upon the proper course of conduct for X's attorney in his representation of X is limited accordingly.

In *United States v. Milburn*[7] the Court of Military Appeals ruled inadmissible certain unwarned statements that Milburn (Y in our hypothetical) had made to a defense counsel representing another accused, named Ellis (X), concerning a related offense. The court also excluded unwarned testimony that Milburn had given at Ellis's trial. The majority excluded the statements made to Ellis's defense counsel, holding that "in such a situation where incriminating statements are deliberately sought from a witness suspect unrepresented by counsel, it is required as a matter of military due process and fundamental fairness that appropriate warnings be given by the questioning defense counsel."[8] In a footnote, the court dubiously characterized the defense counsel's interview of Milburn as "an official investigation of a crime," concluded that under the facts of the case the warnings "appear[ed]" to have been required, and added the following caveat:

> This is not to say that all defense counsel must warn all witnesses whenever requesting statements. However, whenever the accused or a suspect could perceive that the position of authority of these officers is the moving force behind requiring possible incriminating answers to these questions, the warnings must be given.[9]

At least three considerations undermine the current validity of the *Milburn* holding. First, the decision's rationale is based in large part on two authorities that are no longer in effect: ABA Standards, *The Defense Function* § 4.3(b) (1971);[10] and Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 42*c*.[11] Second, *Milburn* predates the article 31 standard enunciated in *United States v. Duga*.[12] Finally, in focusing on protecting the rights of Milburn, the majority in *Milburn* completely ignored the rights of Ellis, the other accused.[13]

A more thoughtful (but more dated) approach by the Court of Military Appeals is displayed in *United States v. Howard*.[14] The accused, Howard (Y), had testified in the

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[5] United States v. Duga, 10 M.J. 206, 209 (C.M.A. 1981) (refusing to construe article 31(b) literally and quoting: "'Judicial discretion indicates a necessity for denying its [article 31's] application to a situation not considered by its framers, and wholly unrelated to the reasons for its creation.'" (quoting United States v. Gibson, 14 C.M.R. 164, 170 (C.M.A. 1954))).

[6] Such cases are directly concerned not with the application of article 31(b), but with the application of article 31(d), which states, "No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial." In order to apply article 31(d), the court often must construe article 31(b) as it applies to the particular case.

[7] 8 M.J. 110 (C.M.A. 1979).

[8] *Id.* at 113. Judge Cook dissented, stating succinctly,

> [D]efense counsel is not an agent of the Government, but an advocate for the accused. I see no justification for imposing on him an obligation to preface his pretrial questioning of a government witness with advice that the witness has a right to remain silent.

Id. at 114.

[9] *Id.* at 112 n.2.

[10] This section stated that "it is proper but not mandatory" for a defense lawyer to caution a prospective witness concerning possible self-incrimination and the need for a lawyer. For a discussion of the current version, standard 4-4.3, providing that "it is not necessary" to do so, see *infra* notes 35-40 and accompanying text.

[11] This provision stated in pertinent part, "In interviewing a witness, counsel should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth when appearing as a witness at the trial. See Article 31." It has no counterpart under the 1984 Manual.

[12] 10 M.J. 206 (C.M.A. 1981). *Duga* propounded a two-pronged test, both prongs of which must be satisfied before article 31(b) applies to a situation:

> [I]n light of Article 31(b)'s purpose and its legislative history, the Article applies only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry. *United States v. Gibson* [14 C.M.R. 164 (C.M.A. 1954)], *supra*. Accordingly, in each case it is necessary to determine whether (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation.

Duga, 10 M.J. at 210. The *Duga* court relied heavily on the *Gibson* decision, especially for its unwillingness to apply article 31 in a wooden fashion. Quoting from *Gibson*, 14 C.M.R. at 170, the court said that article 31(b) should not be read literally in situations "wholly unrelated to the reasons for its creation." *Duga*, 10 M.J. at 209.

[13] At a minimum, Ellis's rights to due process and effective representation of counsel are implicated. *See infra* text accompanying notes 36-58.

[14] 17 C.M.R. 186 (C.M.A. 1954).

earlier trial of a prison guard, Private Martin (X);[15] Howard received no article 31 warnings at Martin's trial. In deciding that Howard's statements in the earlier trial were admissible in Howard's trial, the court examined the legislative history of article 31 and discussed at length the implications of requiring counsel for either side to warn a witness who is suspected of a crime.

> *Congress could not have intended to place the burden on defending attorneys.* It is unreasonable to assume that Congress sought to prescribe different standards for military and civilian defense counsel. Both should be permitted the same latitude in defending accused persons. If a defending counsel at the trial level had to advise a witness that he need not answer any question asked of him because defending counsel suspected the witness might be involved, the possibilities are present that the wrong person might be convicted. That would hardly be proper representation. Moreover, a civilian lawyer would not labor under that difficulty. He is not subject to the Code and he could interrogate the witness at will and thereafter call him to the stand. An interpretation which would circumscribe military counsel in discussing the case with prospective witnesses would in many instances prevent the presentation of an effective defense, and we have no desire to place accused persons and counsel furnished by the armed forces in that legal strait jacket.[16]

Two lower court cases have also dealt with the question of defense counsel warnings. Most recently, *United States v. Rexroad*[17] concerned Airman Rexroad's (Y's) unwarned alibi testimony in response to defense questioning at the assault trial of Airman Ennis (X). The testimony was admitted against him in his own (Rexroad's) subsequent trial for perjury, despite the fact that Ennis's defense counsel failed to warn him under article 31(b). The case is of limited applicability, however, because the *Rexroad* court failed to find that Ennis's defense counsel suspected that Rexroad's testimony was perjurious, thereby avoiding the issue of whether counsel would have had to warn Rexroad had they suspected perjury. The court did note that "the defense counsel representing Ennis were seeking to defend their client, not entrap the accused."[18]

In *United States v. Marshall*[19] the court admitted testimony by a defense counsel who had interviewed Marshall (Y) at a time when the defense counsel represented one of the accused's accomplices (X), despite the fact the defense counsel, a Marine captain, had not provided article 31(b) warnings.[20] The court found, however, that the interview had occurred with the knowledge and consent of Marshall's defense counsel. Rather than base its decision simply on some assumed knowledge by Marshall (through his own counsel) of his article 31(b) rights, the court went to great lengths to explain why it believed the defense counsel interview lacked the requisite "officiality" required to bring article 31 into play in any event.[21] The court reasoned, "Where a lawyer preparing a defense for his client interviews others apparently involved in the same incident we are of the view that his position for this purpose is no different from that of the client he represents."[22]

Other Considerations

The Manual for Courts-Martial[23] provides no guidance regarding the applicability or non-applicability of the rights warning requirement to defense counsel.[24]

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[15] Howard's testimony exculpated Martin, who was acquitted. In testifying, however, Howard admitted to crimes that then formed the basis of his own prosecution.

[16] *Howard*, 17 C.M.R. at 192 (emphasis added). Note the emphasis in the *Howard* case on providing a fair trial to Martin (X in our hypothetical). Conversely, the *Milburn* court emphasized the due process rights of Milburn (Y in our hypothetical).

[17] 9 M.J. 959 (A.F.C.M.R. 1980).

[18] *Id.* at 960.

[19] 45 C.M.R. 802 (N.C.M.R. 1972).

[20] Referring to our hypothetical situation, the *Marshall* case presents the follow-on situation where, after interviewing SSG Y without providing an article 31(b) warning, you are later called as a witness in the trial of SSG Y and permitted to testify as to the admissions made to you by Y. There is one significant factual distinction from our hypothetical, however: in *Marshall*, the interview occurred with the knowledge and consent of Marshall's own defense counsel; in our hypothetical, Y is not represented by a defense counsel at the time of your interview.

[21] The court was careful to limit its holding to the facts of the case, however. *Marshall*, 45 C.M.R. at 808.

[22] *Id.* at 807. The court also relied heavily on the *Howard* case language discussed *supra* notes 14-16 and accompanying text, concluding, "We think those principles are as pertinent to defense counsel's pretrial preparation as to the conduct of the trial itself for without such preparation he could not hope to present an adequate defense." *Id.* at 808. The court further noted that if it held otherwise a defense counsel potentially could face criminal liability for failure to warn (under article 98), a result the court found undesirable.

[23] Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984].

[24] The analysis to Military Rule of Evidence 305(c) states in pertinent part,

> Rule 305(c) basically requires that those persons who are required by statute to give Article 31(b) warnings give such warnings. The Rule refrains from specifying who must give such warnings in view of the unsettled nature of the case law in the area.... The committee was of the opinion, however, that both Rule 305(c) and Article 31(b) should be construed at a minimum, and in compliance with numerous cases, as requiring warnings by those personnel acting in an official disciplinary or law enforcement capacity.

MCM, 1984, Mil. R. Evid. 305 analysis, app. 22, at A22-13 to A22-14.

Army Regulation 27-10 states that the Army Rules of Professional Conduct for Lawyers apply to "lawyers involved in court-martial proceedings in the Army."[25] The same regulation further provides that unless "clearly inconsistent with the UCMJ, the MCM, and applicable departmental regulations, the American Bar Association Standards for Criminal Justice also apply to ... counsel."[26]

In the chapter governing the U.S. Army Trial Defense Service, AR 27-10 states, "[O]nce an attorney-client relationship is formed ..., defense counsel have a positive duty to exercise independent judgment in control of the case. This duty is limited only by law, regulation, and the Army Rules of Professional Conduct for Lawyers."[27]

The Army Rules of Professional Conduct

Although many provisions of Department of the Army Pamphlet 27-26[28] arguably apply in a tangential fashion to our hypothetical situation,[29] none addresses the question of the applicability of the article 31(b) rights warning requirement to the defense counsel interview. Among those having some bearing on the question is Rule 5.4(e), which states,

> Notwithstanding a judge advocate's status as a commissioned officer, a judge advocate detailed or assigned to represent an individual soldier or employee of the Army is expect [sic] to exercise unfettered loyalty and professional independence during the representation consistent with these Rules *and to the same extent as required by a lawyer in private practice.*[30]

The comment to the rule adds that when a judge advocate represents an individual client, "neither the lawyer's personal interests, the interests of other clients, nor the interests of third persons should affect loyalty to the individual client."[31]

In a similar vein, Rule 1.7(b) (concerning conflicts of interest) forbids representing a client "if the representation ... may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests," unless the lawyer does not believe the representation will be adversely affected and the client consents after full disclosure.[32] The comment declares, "Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests."[33] A key point is whether the conflict will "foreclose courses of action that reasonably should be pursued on behalf of the client."[34]

The ABA Standards for Criminal Justice

The American Bar Association Standards for Criminal Justice[35] has this to say about defense counsel providing warnings to witnesses: "It is *not* necessary for the lawyer or the lawyer's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel."[36] The quoted language represents a change from past guidance[37] and is based on the conclusion that "the giving of such warnings is probably inconsistent with counsel's responsibilities under the adversary system."[38]

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[25] Army Reg. 27-10, Legal Services: Military Justice, para. 5-8 (16 Jan. 89) [hereinafter AR 27-10].

[26] *Id.*

[27] *Id.*, para. 6-11*b*(2).

[28] Dep't of Army, Pam. 27-26, Legal Services: Rules of Professional Conduct for Lawyers (31 Dec. 1987) [hereinafter DA Pam. 27-26].

[29] *E.g.*, Rule 4.4 forbids a lawyer from using "methods of obtaining evidence that violate the legal rights of ... a [third] person." DA Pam. 27-26, at 32. This provision simply states the law — it is of no help in interpreting the law or in deciding whether the defense counsel is required by law to provide article 31(b) warnings to a witness whom he suspects of an offense.

[30] DA Pam. 27-26, at 35 (emphasis added).

[31] *Id.*

[32] *Id.* at 11.

[33] *Id.* at 12.

[34] *Id.* at 12.

[35] American Bar Association Standards for Criminal Justice, ***The Defense Function***, Standard 4-4.3(b) (1986) [hereinafter ABA Standard].

[36] ABA Standard at 4.56 (emphasis added).

[37] *See supra* note 10 and accompanying text.

[38] ABA Standard, "History of Standard," at 4.57. The full paragraph is instructive:

> Original paragraph (b) stated that "it is proper but not mandatory" .... The standard now states that "[i]t is not necessary" that such advice be given. This change is due to the belief that the giving of such warnings is probably inconsistent with counsel's responsibilities under the adversary system. Defense counsel's primary duty is to the client, not to prospective witnesses, regardless of the extent to which they may happen to be in need of legal assistance. If the cautionary notice of paragraph (b) were to be given, undoubtedly some witnesses would refuse to speak with the defense, which is difficult to reconcile with the duty of counsel "to seek the lawful objectives of his client" as specified in the Code of Professional Responsibility.

Id. The "Commentary" section, *id.* at 4.58, states, "The lawyer's paramount loyalty to his or her own client must govern in this situation." The "Commentary" cites a New York bar ethics committee opinion to the same effect and then notes that the ABA Ethics Committee has decided it is

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Although civilian fifth amendment rights are not always coextensive with article 31 rights and there is no article 31(b) analogue in the civilian context absent custody, the foregoing ABA guidance is more closely on point for our purposes than any guidance found in DA Pam. 27-26. Moreover, as noted above,[39] the ABA Standards apply to Army counsel unless the standard concerned is "*clearly inconsistent* with the UCMJ, the MCM, and applicable departmental regulations."[40]

Solutions for Military Defense Counsel

The unsettled nature of the law in the area leaves us without a clear solution to the problem posed at the beginning of the article. Below are two of the possible solutions. Solution A is the preferred solution, although it really represents the author's opinion of what the law *should* be in light of the ethical role of a defense counsel, rather than indicating the current state of the law. Solution B is a conservative approach that more clearly comports with the current case law while still attempting to do justice to the ethical standards.

A solution that is *not* presented here is the defense counsel reading SSG Y his article 31 rights prior to questioning; such a course is an unjustifiable "non-solution" in light of the defense counsel's duty to advance zealously the client's interests.[41] Reading Y his rights can *decrease* (but cannot reasonably increase) the chances that SSG Y will talk about his involvement; a civilian attorney (or any civilian) representing your client can question Y without giving any rights warning, thereby maximizing the chances of obtaining admissions beneficial to your client. Accordingly, as defense counsel you should not read Y his rights, because you cannot justifiably take such an avoidable action that is adverse to your client's interests. Reasonable and non-adverse alternatives exist.

Solution A: You Interview Y Without Rights Warning

As a defense counsel you have *one* client and one client only in this case: Specialist X. Although you are an Army officer, your assignment as X's defense counsel means that the government is not your client when you are representing X. Contrary to the language in *Milburn* characterizing the defense counsel's interview as "an official investigation,"[42] your interview of Y (or any witness) is not official in the sense contemplated by the drafters of article 31. You are acting as X's agent when you talk to witnesses,[43] and article 31 does not properly apply to such interviews. Therefore, no rights warning is required and, in light of the detrimental effect on your client's case if the warning dissuades Y from talking to you, no warning should be given.[44]

The two crucial elements in the analysis are your status as agent of your client, X, and your proper role as defense counsel within our adversary system. Regarding the former, the first prong of a *Duga* analysis[45] will not be satisfied (and both prongs must be satisfied in order for article 31(b) to apply) when one focuses on your role as X's agent. Because you are in fact acting as X's agent (not as an agent of the government) in interviewing Y, you are not "acting in an official capacity" when you ask Y

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proper, however, "for a defense lawyer to warn a witness for the prosecution that the testimony might incriminate the witness when it is done for the purpose of discouraging the witness from testifying." *Id.* at 4.58-4.59. This latter, converse problem is beyond the scope of this paper and will not be addressed here except to note that, in the military context, warnings for such a purpose might arguably give rise to a violation of article 98(1) (unnecessary delay in disposition of a case) or article 134 (obstructing justice).

[39] *See supra* text accompanying notes 23-29.

[40] AR 27-10, para. 5-8 (emphasis added).

[41] *See* DA Pam. 27-26, at 2 ("As advocate, a lawyer zealously asserts the client's position under the law and the ethical rules of the adversary system."); *id.* at 6, Comment to Rule 1.3 ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

[42] *See supra* text accompanying note 9. *Compare Milburn with* United States v. Grisham, 16 C.M.R. 268, 272 (C.M.A. 1954) (French police "did not, in any sense, act as instruments of the American military establishment when interrogating the accused" and accused's statements, therefore, were admissible notwithstanding lack of article 31(b) warnings).

[43] *See supra* text accompanying note 22; United States v. Marshall, 45 C.M.R. 802, 807 (N.C.M.R. 1972).

[44] A tactical issue must also be confronted by the defense counsel interviewing Y, namely whether to have anyone else present during the interview (so the other person could serve as a witness later as to what Y said). Although this issue is faced every day by defense counsel conducting interviews, it may be particularly crucial where the interviewee is also a suspect because of the likelihood the witness may invoke his article 31(a) right to silence prior to or at X's trial. If no other person is present, the defense counsel may have to deal with the advocate-witness rule, thereby jeopardizing his right to stay on the case. *See generally* J. Stonerock, The Advocate-Witness Rule: Anachronism or Necessary Restraint? (April 1989) (unpublished manuscript, available through TJAGSA library).

[45] *See supra* note 12. The first prong determines whether the questioner "was acting in an official capacity in his inquiry or only had a personal motivation." *Duga*, 10 M.J. at 210.

questions; you are acting as a surrogate for X,[46] and Y knows it.[47] Your motivation is, like X's own motivation, personal to X.

Regarding your role in the adversary system, you should recall that the purpose in assigning a TDS military counsel to an accused is to provide the accused with representation as independent (and as competent) as he would receive if he had a civilian attorney.[48] The adversary system depends for its validity upon a defense counsel who provides undivided loyalty to the pursuit of the client's interests; the only constraints should be those imposed upon all attorneys as officers of the court.[49] Such a role is crucial, because application of the article 31(b) requirement to a defense counsel interview can result, in the worst case, in the conviction of an innocent person (X).[50]

The *Howard* court was correct in concluding that Congress, in enacting article 31(b), could not have intended to put the accused represented by military defense counsel in a worse position than that of the accused represented by civilian counsel.[51] A correct emphasis on the role of defense counsel (whether military or civilian) is at the heart of this conclusion; there is no systemic justification for an assumption that Congress intended article 31 to apply to military defense counsel when representing a client.[52]

The one obvious problem with following the foregoing reasoning (and interviewing Y without providing warnings) is the *Milburn* case. Although the language in the *Howard* case regarding defense counsel warnings is directly contradictory, *Milburn* did not explicitly overrule it. *Howard*, therefore, may be relied upon for some support in arguing that *Milburn* is wrongly decided or should be limited to its facts. Also, as noted above, the criminal justice system's view of itself (both inside and outside the military) may have shifted substantially since *Milburn* was decided.[53] The newer *Duga* standard and the current ABA view that defense warnings to witnesses are incompatible with the role of defense counsel indicate that *Milburn* should be overruled.[54]

Finally, the *Milburn* case was wrong when decided. The rights of two accused soldiers were involved: Ellis (X in our hypothetical) and Milburn (Y). There is no reason in law or logic to elevate Y's rights over X's simply because X had the misfortune to be tried first.[55] Indeed, the *Milburn* rule turns justice on its head — in worst case scenarios, it presents the spectacle of a system that suppresses the truth in order to convict an innocent person

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[46] The fact that your education and experience make you a desirable substitute for X in asking the questions does not in any way convert the interview into something "official." Certainly a civilian attorney would have comparable qualifications, and no one would argue that it would be an official act if he asked the same questions. The sole difference between you and the civilian attorney is your military status, but your military rank and status alone (at least provided you do not use rank to pressure or coerce the witness into talking) do not make the conversation official for purposes of a *Duga* analysis. United States v. Jones, 24 M.J. 367, 369 (C.M.A. 1987) (staff sergeant (formerly suspect PFC's platoon sergeant), whose motivation for asking suspect questions was personal curiosity, was not required to give article 31(b) warnings because the questioning was not official).

[47] I assume here that the first conversation with any prospective witness includes the defense counsel stating the fact he is acting as defense counsel for X, if that fact is not otherwise understood.

[48] *See supra* text accompanying notes 28-34 (discussing DA Pam. 27-6, Rule 5.4(e)).

[49] For example, the defense counsel may not affirmatively mislead or deceive the prospective witness; the defense counsel remains an officer of the court; and so on. To summarize the concept: while he or she remains (like civilian defense counsel) an officer *of the court*, the TDS attorney representing an accused ceases to act as an officer *of the military establishment* while engaged in such representation. Such a distinction is unquestionably correct in fact (as a matter of how TDS attorneys operate when representing their clients); it should also be correct in law. Of course, if a military defense counsel were to act (or pretend to act) as an instrument of the military establishment and through pressure of rank, etc., seek to *require* a suspect to incriminate himself, the defense counsel no longer would be acting solely as a defense counsel and article 31(b) would apply. The fact that military defense counsel in this manner theoretically could abuse their dual position as a military officer and lawyer should not operate to the detriment of X in our hypothetical, because such reprehensible conduct by military defense counsel is definitely the exception, not the rule. Sanctions against the errant attorney, not a rule prejudicial to his client, are the proper means of dealing with such abuses.

[50] *See supra* text accompanying note 16 (quote from *Howard*). In our hypothetical, conviction of X for larceny of ammunition may result if Y does not corroborate X's truthful account of how he (X) acquired the ammunition.

[51] *See supra* text accompanying note 16 (quote from *Howard*).

[52] This applies only when military defense counsel *act as defense counsel* (such as interviewing SSG Y in our hypothetical), not when they act in any other capacity as a military officer (as, for example, when the senior defense counsel asks his legal clerk about the latter's suspected unauthorized absence, in which case a warning would be required).

[53] *See supra* notes 35-38 and accompanying text.

[54] The ABA Standards apply unless "clearly inconsistent" with the UCMJ, etc. *See supra* text accompanying note 25. In light of the contradiction between *Howard* and *Milburn* as well as the ethical requirements placed on defense counsel by DA Pam. 27-26, it would be exceedingly difficult to maintain that ABA Standard 4-4.3(b) is *clearly* inconsistent with article 31(b). *C.f.* Supervielle, *Article 31(b): Who Should Be Required to Give Warnings?*, 123 Mil. L. Rev. 151, 214 (1989) ("in view of the unsettled nature of the law, a well-reasoned and persuasive argument can be fashioned to support almost any proposition" regarding who should warn under article 31(b)).

[55] For those who are concerned that Solution A may result in the eventual use of Y's unwarned statement against Y (thus seeming to elevate X's rights over Y's), there are two ways of reconciling this concern. First, as X's defense counsel you cannot (and should not) be concerned with designing a perfect judicial system. If the unwarned statement made to X's *military* defense counsel is admissible against Y, so what? The same statement made to X's *civilian* defense counsel is surely admissible against Y under the current law — if that is a failing it is a failing of the current system, not a failing of Solution A (and certainly not a failing that should cause *X's* defense counsel to lose sleep). Second, read on. Later in the article there is a proposed judicial solution that could protect Y.

(X) and allows a guilty person (Y) to go free. If Y knows information that would exculpate X and, after being warned of his rights, Y declines to divulge the information, then it is quite likely that X will be convicted despite his factual innocence of the crime charged. Alternatively, if X's defense counsel gained the needed information from Y without reading him his rights, then Y will quite likely go free, despite the fact that Y is the guilty party. The final irony is that, if the *Milburn* rule is followed, the innocent, X, has the stake driven through his heart by his own champion — his military defense counsel, who, unlike his civilian counterpart, must warn Y of his rights and thereby risk discouraging Y from coming forward to save X from an unjust conviction.

Despite the force of the foregoing arguments, pursuing the course indicated (and interviewing Y without warning him, just as a civilian defense counsel would be free to do) is not without some personal peril to you as military defense counsel. If it is held that there was a duty to warn, you theoretically could be subject to prosecution under article 98.[56]

If failing to warn is considered "conduct that is prejudicial to the administration of justice," you could be guilty of professional misconduct[57] and thereby be subject to sanctions.[58] Therefore, not every defense counsel may wish to assist the client in our hypothetical by making "a good faith effort to determine the validity, scope, meaning, or application of the law"[59] regarding the applicability of article 31(b) to military defense counsel. For those seeking an alternative solution, the following is presented.

Solution B: A Different Interviewer

Once you hang up the phone and realize you may be required to read Y his rights, you are in a conflict of interest situation. Your ethical duty to assist your client by every lawful means is in conflict with a possible statutory duty to read Y his rights; the conflict is all the more acute because the perceived duty to warn may (at least theoretically) be backed up by criminal and professional sanctions against you if you fail to warn.[60]

The professional rules regarding conflicts of interest (discussed earlier)[61] are particularly relevant. Insofar as you personally are unable to carry out an appropriate course of action for your client, i.e., interviewing SSG Y without reading him his rights first, your loyalty to your client is impaired.[62] Significantly, the ethical rules permit representation to continue notwithstanding limitations placed on counsel only if the client consents *and* "the lawyer reasonably believes the representation will not be adversely affected."[63] The comment to this section states, "[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement to provide representation on the basis of the client's consent."[64] Thus, any alternative solution resulting from your reluctance to interview Y yourself without reading him his rights must be objectively reasonable *and* must be consented to by your client, X, after a full disclosure of the dilemma in which you find yourself and its impact on your client's situation.

Although each case must be judged on its own facts, as a general rule reading Y his rights before questioning him would not be objectively reasonable[65] and, therefore, could not be consented to by X. If you believe the current state of the law requires a military defense counsel in your situation to read Y his rights, then you must either seek a good faith modification or extension of that law (along the lines of Solution A) or you must come up with an objectively reasonable alternative means of representation to which your client will consent.

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[56] The legislative history states, "The international [sic] violation of any of the provisions of this article [31] constitutes an offense punishable under article 98." House Hearings, *supra* note 4, at 984. Defense counsel may take some comfort from the apparent fact that "to date there has never been a reported case of a conviction under article 98 for a violation of article 31(b)." Supervielle, *supra* note 54, at 193.

[57] DA Pam. 27-26, Rule 8.4(d), at 40. The Comment to Rule 8.4 states, however, "A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists."

[58] AR 27-10, para. 16-4, lists "[g]rounds for suspension" as including "[p]reventing or obstructing justice, ..., [c]onviction, receipt of nonjudicial punishment, or nonpunitive disciplinary action for a violation of Article 98, UCMJ, ..., [and] [v]iolation of the Army Rules of Professional Conduct for Lawyers ... or other applicable ethical standards."

[59] DA Pam. 27-26, Rule 1.2(d), at 5.

[60] *See supra* notes 56-58 and accompanying text.

[61] *See supra* text accompanying notes 32-34 (discussing Rule 1.7 and the comment thereto, DA Pam. 27-26, at 12).

[62] ABA Standard 4-3.5(a) on conflict of interest states, "At the earliest feasible opportunity defense counsel should disclose to the defendant any interest in or connection with the case *or any other matter that might be relevant to the defendant's selection of a lawyer to represent him or her*" (emphasis added).

[63] DA Pam. 27-26, Rule 1.7(b), at 11.

[64] *Id.* at 12.

[65] Given that a civilian attorney would not have to do so, a disinterested lawyer probably would conclude in most cases that your client should not have you represent him if you plan to read Y his rights. *See supra* text accompanying note 64.

Given that the information possessed by Y is essential to X's defense and you are unable to question Y without providing warnings, the reasonable alternative is to have someone who is not required to provide warnings do the questioning of Y.[66] If your client can afford it, the best alternative may be to have him hire a civilian counsel to assist in the case.[67] Alternatively, if your client cannot afford a lawyer or chooses not to hire one, you may have some other civilian question Y.[68] If your TDS office has a civilian paralegal or other civilian employee, you may be able to have that person question Y; obviously, you must evaluate that individual's ability and experience in deciding whether this is a reasonable alternative, and your client must consent after disclosure. Additionally, to the extent you are concerned that article 31 (and article 98) might apply to you as defense counsel, you must ensure the civilian questioning Y presents himself solely as a representative of the accused, X, not as a representative of you, the military defense counsel. Such an approach should avoid any potential agency problems that otherwise might arise if the civilian were viewed as your agent.[69]

If no suitable civilian is available, then you may have to choose Solution A or seek to withdraw because of conflict of interest.[70] If forced to pursue withdrawal before the judge you must consider tactically whether you wish to disclose on the record *in camera* your dilemma and seek a ruling that you need not read Y his rights (and a related instruction to the trial counsel to not convey to government investigators that Y is a suspect until after you have interviewed him). Although such a motion might not prevail at the trial level in light of *Milburn*, it would serve to develop the issue for appeal. If, as an absolute last resort, you feel compelled to read Y his rights prior to the interview, be sure you can document both your efforts to find a suitable civilian and your efforts to withdraw.[71]

A Solution for COMA

The current state of the law is unsatisfactory because the Court of Military Appeals in *Milburn* held that article 31(b) applied to military defense counsel when acting as defense counsel. The problem is significant because the accused defended by military counsel is comparatively worse off than the accused defended by civilian counsel. The problem is abhorrent to the extent that an innocent person may be convicted through application of the *Milburn* rule.

At the first opportunity, the Court of Military Appeals should overrule *Milburn* and declare article 31(b) to be inapplicable to all defense counsel, military and civilian, *when they are acting as defense counsel.* Overruling *Milburn*, without doing more, could have the ancillary effect of rendering statements made in a defense counsel interview admissible against the interviewee (Y in our example; Milburn in the *Milburn* case) in a subsequent prosecution of the interviewee. If, as the *Milburn* holding indicates, the court is concerned with protecting the

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[66] Seeking testimonial immunity for Y is also an option. However, you are X's defense counsel, not Y's, and there are practical and tactical reasons to avoid this option. With only X's word to sustain the effort, an attempt to compel the government to grant immunity to Y may fail, in which case Y may be forewarned and less likely to talk to you. In any event, to the extent you as military defense counsel are forced to consider (or attempt) the immunity option, your client is comparatively disadvantaged by not having a civilian counsel (who would not feel similarly constrained).

[67] In our hypothetical situation, with trial only two days away, you obviously will need a delay to pursue this alternative.

[68] A civilian private investigator probably would be far less expensive than a civilian attorney. Unless you know the particular investigator from prior dealings, however, it may be difficult for you to help your client evaluate this alternative.

[69] If either the civilian defense counsel or the other civilian is found to be the military defense counsel's agent, two problems may arise. First, the civilian may be required to read article 31 warnings. *Cf.* United States v. Quillen, 27 M.J. 312 (C.M.A. 1988) (civilian PX detective required to read article 31 warnings to military members when civilian conducted questioning "at the behest of military authorities and in furtherance of their duty to investigate crime"); United States v. Kellam, 2 M.J. 338 (A.F.C.M.R. 1976) (deputy sheriff in "close, highly cooperative working relationship" with military required to read article 31 warnings); United States v. Foley, 12 M.J. 826 (N.M.C.M.R. 1981) (civilian police acting "in furtherance of a military investigation" required to give article 31 warnings). Second, the military defense counsel theoretically may still be prosecuted for violating article 98 by using the civilian to avoid the warning requirements of article 31. Although the civilian is not "subject to the code" and, therefore, cannot violate article 31, the military defense counsel who used a civilian to violate article 31 theoretically may be guilty, as a principal under article 77, of violating article 98. *See generally* Manual for Courts-Martial, United States, 1984, Part IV, para. 1; 2 W. LaFave and Scott, Substantive Criminal Law sec. 6.8(e) (1986) and authorities cited therein. *Cf.* United States v. Minor, 11 M.J. 608 (A.C.M.R. 1981) (military accused was guilty of sodomy for forcing victim's civilian boy friend to commit the act even though boy friend was completely innocent of the crime). Whether the civilian is acting solely as the agent of the accused and not as the agent of the military defense counsel will, of course, be a factual determination.

[70] *See* DA Pam. 27-26, Rule 1.7, Conflict of Interest, and Comment to 1.16, Declining or Terminating Representation ("A lawyer should not represent a client in a matter unless it can be performed competently, promptly, *without improper conflict of interest*, and to completion.") (emphasis added). Substitute counsel may not see the issue and, therefore, may interview Y without thinking of reading him his rights.

[71] Absent such documentation you might be vulnerable to an ineffective assistance of counsel allegation should Y invoke his rights when you read them to him. Because of your dilemma, you must keep your client informed throughout and get his consent to any steps you take that fall short of the representation a civilian counsel could provide. As explained earlier, *supra* notes 61-65 and accompanying text, the client cannot consent to having you read Y his rights, because it is not a reasonable alternative (at least not prior to exhausting all of the other alternatives discussed and having each alternative foreclosed in turn).

interviewee, it could fashion a rule that holds article 31(b) to be inapplicable to defense counsel but simultaneously holds unwarned statements to defense counsel to be inadmissible in a prosecution of the interviewee; such a rule could be based on due process. There is ample precedent in the military for fashioning such an innovative remedy to protect Y.[72]

Even the *Milburn* court focused on

> *protect[ing] this particular accused* from being an unnecessary victim of the peculiarities of the military society. In addition, this Court must take action to guarantee a fair trial where the principles of fundamental fairness embodied within the military justice system as a whole are apparently frustrated by conflicting Manual provisions.[73]

Given the *Milburn* court's entirely appropriate focus on the rights of Milburn, it is difficult to understand why the court went beyond protecting Milburn and adopted a rule that not only protected Milburn (Y) but also disadvantaged Ellis (X). Disallowing the testimony of Ellis's attorney in Milburn's prosecution thoroughly addresses the need for protecting Milburn; going on to further prevent Ellis's attorney (and others similarly situated) from assisting his own client to the same degree that a civilian counsel could do so is, given the problem the *Milburn* court was addressing, a *non sequitur*.

In situations like the hypothetical described at the outset of this article, the goal should be to remedy the disability under which military counsel and their clients are forced by *Milburn* to operate. The remedy should permit Y's statements to be freely obtained and used in the defense of X; the remedy need not necessarily allow use of Y's statements against Y.

Conclusion

Like all statutes, article 31(b) should be construed in a manner consistent with its legislative intent. There is nothing in the legislative history to indicate that Congress intended article 31(b) to apply to the defense counsel interview. Where a construction not clearly consistent with legislative intent has the potential to send an innocent accused needlessly to jail, such a construction should be abandoned or revised in the interest of justice.

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[72] *E.g.*, Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982) (refusing on due process grounds to allow prosecution of accused where staff judge advocate had created reasonable expectation accused would not be prosecuted if he cooperated in matters concerning national security); United States v. Booker, 3 M.J. 443 (C.M.A. 1977) (holding evidence of prior nonjudicial punishments or summary courts-martial inadmissible unless the accused had been advised of his right to consult with an independent counsel prior to waiving the right to demand trial by court-martial); United States v. Jordan, 1 M.J. 334 (C.M.A. 1976) (holding that whenever American officials are present at the scene of a foreign search or, even if not present, provide information or assistance that sets in motion or otherwise furthers the objective of the search, the search must satisfy the fourth amendment as applied to the military in order for fruits of the search to be admissible at court-martial), *modified*, United States v. Morrison, 12 M.J. 272 (C.M.A. 1982); United States v. Giarratano, 20 M.J. 553 (A.C.M.R. 1985) (approving trial judge's use of innovative remedies to protect accused in case tainted by command influence, including refusing to allow unfavorable character evidence against accused and ruling that the convening authority was disqualified from acting as reviewing authority), *aff'd*, United States v. Thomas, 22 M.J. 388 (C.M.A. 1986), *cert. denied*, Thomas v. United States, 479 U.S. 1085 (1987).

[73] *Milburn*, 8 M.J. at 113 (emphasis added).

Confidentiality: The Evidentiary Rule Versus the Ethical Rule

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Introduction

Society has long recognized that individuals should feel free to disclose all matters about the issue at hand to the attorneys who represent them. Moreover, society recognizes that attorneys should be informed of all matters in order to provide full and competent representation. When representing clients, attorneys become virtual fountains of knowledge about their clients and the matter in issue. To accommodate the full disclosure of facts about a case and to keep inviolate the attorney-client relationship, the law and legal profession have developed two rules of confidentiality: the ethical rule and the evidentiary rule. This article will highlight these rules, discuss their relationship, and examine their major differences as they pertain to the Army practitioner.

The Evidentiary Rule

Military Rule of Evidence 502[1] contains the evidentiary rule of confidentiality for the military attorney. Essentially, the rule states that, absent waiver, the client has a testimonial privilege from disclosure of confidential communications between the client and the attorney that were made for the purposes of seeking or obtaining legal services. Although the privilege rests with the client, unless contrary evidence exists the attorney is presumed to have the authority to claim the privilege on behalf of the client.[2] The Supreme Court has stated the following about the attorney-client privilege:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. [citation omitted] Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.[3]

Practitioners should note that a close reading of the evidentiary rule reveals that there are certain prerequisites before the communication falls within the evidentiary privilege. First, the communication must come from the client or from the client's representative.[4] A client is defined as "a person, public officer, corporation ... or other entity ... who receives professional legal services from a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer."[5] If the communication comes from anyone other than the client (or the client's representative), the communication does not fall within the scope of the evidentiary privilege, even when the communication is subsequently made known to the client by the attorney.[6] Second, to fall within the ambit of the evidentiary rule, the communication must be confidential, that is, "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of legal services to the client or those reasonably necessary for the transmission of the communication."[7] Third, the communication must normally be made to the lawyer or a person assisting the lawyer.[8]

Finally, even if all the prerequisites are satisfied, five exceptions exist to the attorney-client privilege.[9] First, no protection from disclosure exists for any communication that clearly contemplates the commission of a crime or fraud in the future.[10] Second, the attorney-client privilege does not protect disclosure of communications relevant to an issue of breaches of duty by the lawyer or the client.[11] The typical situation where this exception applies in the military is when a client raises ineffective assistance of counsel during the appellate process of the client's case. The three other exceptions recognized by the evidentiary privilege will seldom arise in military justice practice. These are for communications relevant to the following: a) an issue between parties who claim property through the same deceased client;[12] b) an issue concerning a document to which the attorney is an attesting witness;[13] and c) matters of common interest between clients if the communication was made by any client to a lawyer providing advice to multiple clients and the communication is offered in litigation between any of the clients.[14] What this last exception means is that once a client sues another client who is represented by the same attorney in a common matter, the attorney-client privilege disappears.

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[1] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 502 [hereinafter MCM, 1984, and Mil. R. Evid. 502, respectively].

[2] Mil. R. Evid. 502(c).

[3] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[4] Mil. R. Evid. 502 (a). (Although Mil. R. Evid 502(b) defines the terms client, lawyer, and lawyer's representative, it does not define "client's representative.")

[5] Mil. R. Evid. 502(b)(1).

[6] *See, e.g.*, United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950); *In re* Bretto, 231 F. Supp. 529 (D. Minn. 1964); United States v. Bonnell, 483 F. Supp. 1091 (D. Minn. 1979).

[7] Mil. R. Evid. 502(b)(4).

[8] Mil. R. Evid. 502(a).

[9] Mil. R. Evid. 502(d).

[10] Mil. R. Evid. 502(d)(1).

[11] Mil. R. Evid. 502(d)(3).

[12] Mil. R. Evid. 502(d)(2).

[13] Mil. R. Evid. 502(d)(4).

[14] Mil. R. Evid. 502(d)(5).

One important aspect that must be remembered about the evidentiary rule is that it is an evidentiary privilege. As such, the attorney-client privilege has limited application; it may be invoked only in proceedings authorized under the Uniform Code of Military Justice,[15] the Manual for Courts-Martial,[16] or other proceedings to which the evidentiary privilege is made specifically applicable.[17]

The Ethical Rule

The ethical rule regarding confidentiality for Army attorneys exists in the Rules of Professional Conduct for Lawyers.[18] As a general rule, Army Rule 1.6 indicates that an attorney shall not reveal any information relating to the representation of a client.[19] The ethical rule also contains exceptions, which can be classified into two categories: permissive and mandatory. The rule recognizes three permissive exceptions. First, the client may consent to disclosure of otherwise confidential information.[20] Second, disclosure of confidential information may be impliedly authorized to carry out the representation.[21] For example, a lawyer giving the handwritten notes of a conversation with a client to a secretary in the office for filing would fall within this exception. Third, the lawyer may disclose confidential information to establish a claim or defense in a controversy with a client.[22]

Nothing compels disclosure of the permissive exceptions. The lawyer has complete discretion whether to reveal the information in these three situations. Although the lawyer may decide to disclose such information, he or she is not required to do so. If the lawyer chooses to disclose the information, the disclosure should be no greater than is reasonably necessary under the circumstances.[23]

The one mandatory exception to the Army ethical rule of confidentiality involves a limited future crime exception. An attorney must disclose information which the lawyer reasonably believes necessary to prevent a client from committing a crime which is likely to result in imminent death or substantial bodily harm, or significantly impair the readiness or capability of a military unit, vessel, aircraft, or weapon system.[24] If the future criminal act does not fall within the limited guidelines of Army Rule 1.6, there is no authority for revealing the intended offense. The attorney has no discretion—he or she must maintain inviolate the information. For example, if the attorney knows that his client is going to kidnap the client's children from the client's estranged spouse who has been granted custody of the children, and there exists no reasonable likelihood of substantial bodily harm to anyone, the attorney may not ethically disclose this information to the estranged spouse or anyone else.

The Army rules recognize that other situations may exist outside of those contained in Army Rule 1.6 wherein a lawyer may be obligated or permitted to disclose otherwise confidential information about a client.[25] For example, if the attorney learns that a witness or client is going to commit perjury and the lawyer cannot convince the witness or client not to do so, the Army rules indicate that candor to the tribunal takes precedence over the attorney-client relationship, and the intended perjury should be disclosed to the tribunal.[26] Furthermore, the rules take the position that attorneys should presume that the ethical rule of confidentiality takes priority over other conflicting provisions of law.[27] Nevertheless, disclosure should be made only when required by a tribunal of competent jurisdiction and only as a last resort.

Comparison of the Two Rules

Even a cursory reading of the evidentiary and ethical rules on confidentiality reveals obvious differences. The rules are not co-extensive. They differ in at least three major respects: 1) in their scope of coverage; 2) in their

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[15] 10 U.S.C. § 801-940 (1982).

[16] *See* Mil. R. Evid. 1101.

[17] *See, e.g.*, Army Reg. 15-6, Boards, Commissions, and Committees: Procedure For Investigating Officers and Boards of Officers, para. 3-6c(1) (11 June 1988).

[18] Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers (31 Dec. 1987) [hereinafter Army Rule].

[19] Army Rule 1.6(a).

[20] *Id.*

[21] *Id.*

[22] Army Rule 1.6(c).

[23] Army Rule 1.6 comment.

[24] Army Rule 1.6(b).

[25] Army Rule 1.6 comment. *See, e.g.*, Army Rules 1.13, 2.2, 2.3, 3.3 and 4.1.

[26] Army Rule 3.3 comment.

[27] Army Rule 1.6 comment.

applicability; and 3) in the area of future crimes. The evidentiary rule protects *communications between the client and attorney,* whereas, the ethical rule protects *information relating to the representation* (emphasis added).

Under the ethical rule, the information need not come from the client or the client's representative. The information can come from any source—it need only relate to the representation of the client. The primary basis for the ethical rule stems from a lawyer's fiduciary duties as an agent of the client.[28] The rule protects privacy interests and attempts to encompass the duty of loyalty required of a fiduciary. In fact, the broadness of the Army rule is apparent when compared to its predecessor.[29] The former rule protected only confidences and secrets, that is, "information protected by the attorney-client privilege ... and ... other information gained in the professional relationship that the client requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[30] If the basis for the ethical rule is truly an agency one, then the former rule failed to reflect the full scope of the lawyer's fiduciary duties. The attorney's fiduciary obligations under agency principles would necessarily extend to all information about the client, regardless of whether its disclosure would be detrimental or embarrassing to the client.

The current ethical rule is, therefore, more consistent with agency principles. To come within the scope of Army Rule 1.6, the information need only relate to the representation and the attorney need not speculate about whether the information may be embarrassing or detrimental to the client. Also, the time that the information is obtained is irrelevant. The information may be acquired before or after the attorney-client relationship exists. In short, the first obvious difference between the ethical and evidentiary rules of confidentiality is that the ethical rule is much broader in its scope of coverage than the evidentiary rule.

Contrary to the ethical rule, the evidentiary privilege becomes applicable only when the lawyer is being asked to testify in formal proceedings about professional communications with a client.

> The lawyer-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of lawyer-client confidentiality applies in situations other than those where evidence is sought from the lawyer through the compulsion of law.[31]

An example of this distinction, along with the earlier distinction regarding the scope of the rules' coverage, would exist in the situation where the defense attorney in an arson case learns from the client's homosexual lover that the client told the lover that he committed the arson because of the Army policy against homosexuals. Under the ethical rule, the information in this situation concerns the representation of the client and is confidential. Because it did not come from the client (assuming the client refuses to admit his culpability in the arson or his homosexuality to the attorney), the information fails to satisfy the evidentiary privilege's prerequisites.

Assume further that a court-martial acquits the client of the arson and the Army first learns of the client's alleged homosexual activities after trial. The attorney would have an affirmative obligation not to disclose the information about his former client's homosexuality and would violate Army Rule 1.6 by disclosing the information. Because the information is not within the attorney-client privilege, however, the attorney could be compelled in a judicial proceeding to reveal what information he possessed about the client's homosexuality.[32] Thus, another basic difference between the ethical and evidentiary rules is that the ethical rule does not exist merely in cases where the lawyer faces inquiry from others. As one commentator has stated:

> The [ethical] principle of confidentiality binds the lawyer at all times, and prevents voluntary disclosure except when made in furtherance of the legal representation itself. Indeed, it is the broader principle of confidentiality that, in a judicial setting, requires a lawyer initially to resist answering questions and to insist upon testing the applicability of the attorney-client privilege.[33]

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[28] American Bar Association, Annotated Model Rules of Professional Conduct Rule 1.6 comment (1984).

[29] Before the adoption of the Army Rules, the Army applied the ABA Model Code of Professional Responsibility DR 4-101 (1980). For a discussion of how the current Army Rule represents a change from the former ABA position, see Ingold, *An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers*, 124 Mil. L. Rev. 1 (1989).

[30] Model Code of Professional Responsibility DR 4-101 (1980).

[31] Army Rule 1.6 comment.

[32] An argument could be made that the attorney "work product" doctrine prevents disclosure of this information. For the "work product" doctrine to apply, the focus is on the attorney's possession of information generated in anticipation of litigation. For an overview of the "work product" doctrine, see C. Wolfram, Modern Legal Ethics § 6.6 (1986).

[33] G. Hazard & W. Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct 90.5 (Supp. 1989).

Although broader than the attorney-client privilege, the ethical rule also recognizes that a lawyer must comply with the final orders of a court requiring the lawyer to reveal information about a client.[34]

A quick glance at the exceptions to the two rules reveals a major difference in the future crimes area. While the ethical rule mandates disclosure when the lawyer obtains information that causes the attorney to reasonably believe that the client will commit a criminal act likely to cause imminent death or substantial bodily harm, or cause significant impairment of national security or military readiness, the evidentiary rule has no privilege for future crimes or frauds. Once again, the broad nature of the ethical rule comes to the forefront. While a lawyer may be compelled by a tribunal of competent jurisdiction to divulge communications about the client's future crimes, the attorney otherwise has an affirmative obligation under the ethical rule to hold inviolate the information, unless the future crime fits within the mandatory disclosure exception under Army Rule 1.6.

Conclusion

Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence. Without it, the client may withhold essential information from the lawyer. Thus, important evidence may not be obtained, valuable defenses neglected, and, perhaps most significant, the lawyer may not be forewarned of evidence that will be presented by the prosecution. The obligation of confidentiality in the lawyer-client relation has been established to encourage candor and full disclosure.[35]

As long as the coverage of the evidentiary and ethical rules is different, the goal of candor and full disclosure between the attorney and the client can never be reached. For example, because the ethical rule provides protection from disclosure for certain future crimes and the evidentiary rule provides no protection for the same crime, an attorney cannot feel comfortable in advising a client that what the client tells the attorney always will remain confidential. Otherwise, there may be situations in which the client will feel betrayed by the attorney. Only when both the client and the attorney understand the interplay between and the consequences of the ethical and evidentiary rules will "trust and confidence" exist in the attorney-client relationship.

[34] Army Rule 1.6 comment.

[35] American Bar Association, Standards for Criminal Justice, The Defense Function, Standard 4-3.1 commentary (1986).

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

Consider Collateral Consequences

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A decision issued last summer by the Ninth Circuit Court of Appeals may have important implications for trial defense counsel and their clients. In *Davis v. Marsh* the Ninth Circuit held that, absent a showing of cause and prejudice, a plaintiff's failure to raise federal constitutional claims in the military court system barred that plaintiff from raising those issues when collaterally attacking her court-martial conviction.[1] This decision is part of an important trend in the federal courts over the last two decades towards significantly reducing the

[1] Davis v. Marsh, 876 F.2d 1446 (9th Cir. 1989). *See also* Wolff v. United States, 737 F.2d 877 (10th Cir.), *cert. denied*, 469 U.S. 1076 (1984).

availability of federal habeas corpus relief to individuals convicted of crimes in state courts.[2] The *Davis* decision places yet another responsibility on military defense counsel. Fortunately, however, two recent decisions by the Court of Military Appeals should act to eliminate in the military system the type of harsh consequences that *Davis* and related cases represent.

Mychelle Davis was convicted by a special court-martial for striking a superior noncommissioned officer, being disrespectful to a superior noncommissioned officer who was in the execution of his office, willfully disobeying orders from a superior noncommissioned officer, and leaving her appointed place of duty without authority.[3] Ms. Davis was represented at her court-martial by detailed military counsel and claimed that the incident giving rise to these offenses was the result of sexual harassment by her superiors. On appeal, the only error raised by military appellate defense counsel was that the military judge erred by failing to explain the concept of "divestiture" to a member of the court-martial. The Army Court of Military Review affirmed her conviction and the Court of Military Appeals denied review.[4] Ms. Davis then filed suit in federal district court, seeking three forms of relief: 1) a declaratory judgment voiding her court-martial; 2) damages; and 3) an order enjoining military officers from future sexual harassment.[5] Ms. Davis claimed that her court-martial suffered from two constitutional defects: 1) she was denied the effective assistance of counsel; and 2) she was denied due process because blacks and women were excluded from the court-martial panel.[6]

In affirming the district court's dismissal of the complaint, the Court of Appeals analogized the military justice system to state court systems but pointed out that the Supreme Court has repeatedly admonished federal courts to "afford even more deference to military court determinations than to those of state courts."[7] The court noted that the two doctrines of exhaustion of military remedies and abstention from intervention in ongoing military prosecutions, except under extraordinary circumstances, had already been held applicable to military convictions by the Supreme Court and there was no reason that the analogous doctrine of waiver announced in *Wainwright v. Sykes* should not be applied as well.[8] The court noted, however, that there was no need to adopt a waiver rule more strict than the cause and prejudice test announced in *Sykes* because to do so "would erode to the vanishing point the limited jurisdiction federal courts do have to review courts-martial for constitutional error."[9]

The Supreme Court left the precise content of the *Sykes* cause and prejudice standard for development in subsequent case law. The cause and prejudice test has been fleshed out to some extent during the thirteen years since *Sykes* was announced.[10] Nevertheless, this area of the law remains fraught with ambiguity and uncertainty. For this reason, trial defense counsel must be particularly wary during their representation of an accused not to foreclose inadvertently a potential basis for relief in a future collateral attack.

In *Sykes* the Supreme Court gave some tell-tale hints that indicated the direction its development of the "cause and prejudice" test would take. The Court indicated that the burden of demonstrating both cause and prejudice rested with the petitioner and that the burden would be a heavy one.[11] The Court further indicated, in a footnote to *Sykes*,[12] that "decisions of counsel relating to trial strategy, even when made without the consultation of the defendant, would bar direct federal review of claims thereby foregone, except where 'the circumstances are exceptional.'"

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[2] *See, e.g.*, Davis v. United States, 411 U.S. 233 (1973); Francis v. Henderson, 425 U.S. 536 (1976); Wainwright v. Sykes, 433 U.S. 72 (1977); Rose v. Lundy, 455 U.S. 509 (1982); Engle v. Isaac, 456 U.S. 107 (1982); Murray v. Carrier, 477 U.S. 478 (1986); Smith v. Murray, 477 U.S. 527 (1986); Teague v. Lane, 109 S. Ct. 1060 (1989); Butler v. McKellar, 58 U.S.L.W. 4294 (U.S. 5 Mar. 1990); Saffle v. Parks, 58 U.S.L.W. 4322 (U.S. 5 Mar. 1990).

[3] 876 F.2d 1446-47.

[4] *Id.*

[5] *Id.* at 1448. The court noted that the most common method of collaterally attacking a court-martial is to petition for a writ of habeas corpus. But the court also pointed out that other procedural routes seem to be available as well, including suits for backpay under the Tucker Act and suits for declaratory relief.

It should be emphasized that this article is designed to foster trial defense counsel's ability to preserve issues for future collateral attack—should that become necessary. Army judge advocates are prohibited from acting as petitioners' counsel in habeas corpus proceedings. 18 U.S.C. § 205 (1982); Army Reg. 27-40, Legal Services: Litigation, para. 1-6 (4 Dec. 1985).

[6] *Id.* at 1448.

[7] *Id.* at 1449-50 (citing Noyd v. Bond, 395 U.S. 683, 694 (1969), and Burns v. Wilson, 346 U.S. 137, 142 (1953)).

[8] *Id.* at 1449 (citing Gusik v. Schilder, 340 U.S. 124, 131-32 (1950), and Schlesinger v. Councilman, 420 U.S. 738, 753-58 (1975)); Wainwright v. Sykes, 433 U.S. 72.

[9] *Marsh*, 876 F.2d at 1449.

[10] A helpful guide to practice in this area is L. Yackle, Postconviction Remedies (1981). See particularly §§ 70-87 for a discussion of the meaning of "cause" and "prejudice" and for a useful historical analysis of related issues.

[11] *Id.* at 346. *See Wainwright*, 433 U.S. at 87, 91.

[12] *Id.* at 91 n.14 (citing Henry v. Mississippi, 379 U.S. 443, 451 (1965)).

A brief look at a few of the cases since *Sykes* that have further curtailed the availability of habeas corpus by refining the cause and prejudice test will shed some light on the types of pitfalls that trial defense counsel must be increasingly wary to avoid. It should be noted that the real burden of this line of cases falls squarely on the shoulders of accused soldiers because they are increasingly held responsible for the errors of their attorneys—unless they can establish that their particular attorney's conduct was so egregious that it amounts to ineffective assistance of counsel under Supreme Court standards and thus a violation of the sixth amendment right to counsel.[13]

In *Engle v. Isaac*[14] the Court wrote,

> We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as a cause for a procedural default.[15]

In *Murray v. Carrier*[16] Justice O'Connor provided the following guidance: "At a minimum, then, *Wainwright v. Sykes* plainly implied that default of a constitutional claim by counsel pursuant to a trial strategy or tactical decision would, absent extraordinary circumstances, bind the habeas petitioner even if he had not personally waived that claim."[17] The Court then went on to expand the range of attorney errors for which clients would be liable:

> We think, then, that the question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington, supra*, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default. Instead, we think that the existence of cause for procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel, *see Reed v. Ross*, 468 U.S. at 16, or that 'some interference by officials,' *Brown v. Allen*, 344 U.S. 443, 486 (1953), made compliance impracticable, would constitute cause under this standard.[18]

Last term, the Court decided *Teague v. Lane*[19] and *Penry v. Lynaugh*.[20] In *Teague* and *Penry* the Court severely restricted habeas corpus challenges to convictions by basically holding that a new decision is generally not applicable to cases on collateral review unless the decision was dictated by precedent existing at the time the petitioner's conviction became final.[21] The rule has two narrow exceptions:

> First, a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Second, a new rule should be applied retroactively if it requires the observance of "those procedures that ... are implicit in the concept of ordered liberty."[22]

The Court applied prior analysis by Justice Harlan to arrive at this rule and its two exceptions.[23]

On 5 March 1990, the Court continued to narrow the potential avenue of habeas relief when it announced the decisions in two habeas corpus cases involving the death

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[13] Strickland v. Washington, 466 U.S. 668 (1984).

[14] 456 U.S. 107 (1982).

[15] *Id.* at 133-34 (footnote omitted).

[16] 477 U.S. 478 (1986).

[17] *Id.* at 485.

[18] *Id.* at 488; Strickland v. Washington, 466 U.S. 468 (1984). It should be noted that in a companion case to *Carrier*, Smith v. Murray, 477 U.S. 527 (1986), the Court denied a writ of habeas corpus without ruling on the merits of Smith's constitutional claim. Like Carrier, Smith's attorney had mistakenly failed to raise the one claim on appeal of his state murder conviction that would have entitled him to federal habeas relief. Michael Marnell Smith was electrocuted in August 1986. *See* Friedman, A Tale of Two Habeas, 73 Minn. L. Rev. 247, 248 (1988).

[19] 109 S. Ct. 1060 (1989).

[20] 109 S. Ct. 2934 (1989).

[21] Butler v. McKellar, 58 U.S.L.W. 4294, 4295 (U.S. Mar. 5, 1990). *See also Teague*, 109 S. Ct. at 1070.

[22] *Teague*, 109 S. Ct. at 1073 (citations omitted).

[23] *Id.* at 10717-8 (citing Mackey v. United States, 401 U.S. 667 (1971) (separate opinion of Harlan, J.)); Desist v. United States, 394 U.S. 244 (1969) (Harlan, J., dissenting).

penalty. In *Butler v. McKellar*[24] the Court interpreted "new rule" in such a way that "[a] legal ruling sought by a federal habeas petitioner is now deemed 'new' as long as the correctness of the rule, based on precedent existing when the petitioner's conviction became final, is 'susceptible to debate among reasonable minds.'"[25]

In *Saffle v. Parks*,[26] also a 5 to 4 decision, Justice Kennedy cited *Butler* and wrote that "the 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."[27]

A catalog of some of the issues the Court has held waived in the line of cases from *Engle* to *Saffle* is very instructive for trial defense counsel. In *Engle* the petitioners and their attorneys had failed at trial to comply with an Ohio rule of procedure requiring contemporaneous objections to jury instructions. In their petitions for habeas corpus, the prisoners claimed that they could not have known at the time of their trial that an Ohio rule saddling criminal defendants with the burden of proving an affirmative defense of self-defense was unconstitutional. The Court rejected that contention, saying that in light of decisions like *In re Winship*,[28] "we cannot say that respondents lacked the tools to construct their constitutional claims."[29]

In *Carrier* the trial judge had denied defense counsel's request to examine the victim's statement to police. Carrier's counsel included in the notice of appeal a claim that denial of access to the report violated Carrier's rights, but failed to address the issue in the appellate brief. Had the constitutional claim been properly preserved, it might have entitled petitioner to federal habeas relief as a denial of proper discovery under *Brady v. Maryland*.[30]

In *Teague* the Court was able to put off for another day the issue whether the sixth amendment's fair cross-section requirement should be extended to the petit jury.[31] In *Butler* the Court found that petitioner was not entitled to the benefit of the Court's decision in *Arizona v. Roberson*,[32] which held that the fifth amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation. The Court held that *Roberson* stated a "new rule," even though the majority in *Roberson* stated that the case was directly controlled by the Court's prior decision in *Edwards v. Arizona*.[33] Finally, in *Saffle* the Court refused to consider the claim that the judge's instruction to the jury to avoid any "influence of sympathy" in deciding on the sentence violated the constitutional ban on cruel and unusual punishment because it, in effect, told the jury to disregard mitigating evidence. The Court said that the respondent, Parks, was not entitled to federal habeas relief because "[t]he principle he urges is a new rule within the meaning of *Teague v. Lane*, 489 U.S. ___, (1989). It is not dictated by our prior cases and, were it to be adopted, it would contravene well considered precedents."[34]

The analyses and results in *Davis* and the other progeny of *Sykes* discussed above are consistent with the positions advocated by various commentators on military law over the last two decades.[35] The hallmark of these positions is the view that the military justice system is capable of protecting the constitutional rights of servicemembers and of dispensing justice of a quality at least

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[24] 58 U.S.L.W. 4294 (U.S. Mar. 5, 1990).

[25] *Butler*, 58 U.S.L.W. at 4297 (Brennan, J., dissenting and quoting majority opinion of Rehnquist, C.J.). Justice Brennan wrote,

> Today, under the guise of fine-tuning the definition of "new-rule," the Court strips state prisoners of virtually *any* meaningful federal review of the constitutionality of their incarceration ... Put another way, a state prisoner can secure habeas relief only by showing that the state court's rejection of the constitutional challenge was *so* clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist. With this requirement, the Court has finally succeeded in its thinly veiled crusade to eviscerate Congress' habeas corpus regime.

Id. (emphasis in original).

[26] 58 U.S.L.W. 4322 (U.S. Mar. 5, 1990).

[27] *Id.* at 4323. As Justice Brennan wrote in *Butler*, "After today, despite constitutional defects in the state processes leading to their conviction or sentencing, state prisoners will languish in jail — and others like Butler will die — because state courts were reasonable, even though wrong." *Butler*, 58 U.S.L.W. at 4301.

[28] 397 U.S. 358 (1970).

[29] 456 U.S. at 133.

[30] 373 U.S. 83 (1963).

[31] *Teague*, 109 S. Ct. at 1065.

[32] 486 U.S. 675 (1988).

[33] 451 U.S. 477 (1981).

[34] *Saffle*, 58 U.S.L.W. at 4322.

[35] *See, e.g.*, Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 Mil. L. Rev. 5 (1985); Strassburg, *Civilian Judicial Review of Military Criminal Justice*, 66 Mil. L. Rev. 1 (1974); Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 Mil L. Rev. 1 (1975). The Rosen article is particularly useful given its relative recency and large number of helpful citations. It is also interesting to see how many of the suggestions advocated by Colonel Strassburg in 1974 and Major Rosen in 1985 have been implemented through legislation and court decisions.

as good as any state criminal justice system, while at the same time accommodating the legitimate special needs of the armed services.[36] A great deal of the burden of constantly proving the accuracy of this view falls upon the military defense counsel.

As the Court in *Davis* noted, although ineffective assistance of counsel can constitute "cause" for procedural defect, it is often difficult to show that a defense counsel's representation is "outside the wide range of professionally competent assistance" as contemplated by *Strickland v. Washington*.[37] Furthermore, "attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when that default occurs on appeal rather than at trial."[38] As a result, defense counsel should be extremely vigilant and inventive in raising potential constitutional errors. In particular, to assist in possible later collateral attack of a court-martial conviction based on constitutional error, trial defense counsel should preserve the error by clearly raising it at trial. Even errors that might subsequently be described as meritless by military appellate courts should be considered, as they may find a more favorable hearing in whatever federal district court an eventual collateral attack on the court-martial conviction is conducted.[39]

A good example of why defense counsel in the field need to *clearly* state their position on the record is the recent Court of Military Appeals case of *United States v. Davis*.[40] In this case the defense counsel had requested the government to produce a potential alibi witness. The government was unable to serve a subpoena on the witness, despite trying diligently for several days. The military judge put off resolving defense's request for the witness until after the government's case-in-chief. When the government's case was finished and the defense witness still had not been subpoenaed, the military judge found the witness to be both material and necessary, but ordered the defense to "drive on" without her. At this point, instead of requesting a continuance or abatement of the proceedings in accordance with Rule for Courts-Martial 703(b)(3),[41] defense counsel called the one remaining witness that was available to the defense. On appeal, the Court of Military Appeals held that there was no violation of the appellant's right to compulsory process under the sixth amendment or article 46 of the Uniform Code of Military Justice because defense counsel was "required to elect and justify a remedy short of dismissal, either a continuance or abatement."[42] Although it could be argued that it was obvious from the whole nature of the proceedings that defense counsel was requesting a continuance or abatement and that the military judge ordered the defense to proceed anyway, the Court of Military Appeals' decision makes it clear that defense counsel was required to invoke the "magic words" of continuance or abatement. Although the court does not mention the doctrine of waiver in its opinion, the decision is based upon a waiver-type analysis. The court said that "[f]or whatever reason, appellant chose not to seek either a continuance or an abatement of the proceedings when the witness was deemed unavailable. In light of appellant's election not to comply with these reasonable procedural requirements, we find no violation of his right to compulsory process."[43] Whether the actions of defense counsel will serve as a bar to collaterally attacking Davis's conviction on sixth amendment grounds remains to be seen. Nevertheless, the lesson for defense counsel is clear: object clearly on the record and expressly state the full range of relief sought.[44]

Finally, it should be noted that the potential harsh effects of *Davis v. Marsh, United States v. Davis*, and related decisions may be softened somewhat by the Court of Military Appeals' decisions in *United States v. Evans*[45] and *United States v. Hilton*.[46] In *Hilton* the court

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[36] *See, e.g.*, Rosen, *supra* note 35, at 1-10, 80-88; Strassburg, *supra* note 35, at 48-63.

[37] *Davis*, 876 F.2d at 1450 (citing Murray v. Carrier, 477 U.S. 478, 488); Strickland v. Washington, 466 U.S. 468.

[38] White v. Lewis, 874 F.2d 599, 604 (9th Cir. 1989).

[39] For additional information in this area, consult D. Manville and G. Brezna, Post-Conviction Remedies: A Self-Help Manual (1988); D. Wilkes, Jr. Federal and State Postconviction Remedies and Relief (1983); and Berkowitz, *Collateral Attack of Court-Martial Convictions*, 14 The Advocate 303 (1982).

[40] 29 M.J. 357 (C.M.A. 1990).

[41] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 703(b)(3).

[42] *Davis*, 29 M.J. at 360.

[43] *Id.* at 360.

[44] The court in *Davis* pointed out in a footnote another lesson to be learned from this case. "When a defense counsel becomes aware of a relevant and material witness who may be unamenable to service of process, it would serve counsel well to first obtain from the potential witness an affidavit which is, in turn, witnessed by a third party. If the witness remains true to form and refuses to testify, defense counsel can at least offer the affidavit as an exception to the hearsay rule under Mil R. Evid. 804(b)(5)." *Id.* n.3.

[45] 28 M.J. 74 (1989).

[46] 27 M.J. 323 (1989).

held that failure to raise constitutional and statutory questions at trial by court-martial does not necessarily preclude their consideration by military appellate authorities. The court said that although the mere failure to object even on constitutional grounds might foreclose appellate review of those claims in some cases, this practice need not be applied where apposite precedent from appellate courts militates against the lodging of an appropriate objection or when the court deems review necessary on its own motion.[47] In *Evans* the court held that in the exercise of the statutory authority under article 66(c),[48] a court of military review may properly refuse to apply the doctrine of waiver in the exercise of its statutory authority. The Court of Military Appeals said that although a failure to file a timely motion at trial may estop one from raising the issue on appeal, it does not preclude a court of military review from granting relief.[49]

These two decisions, taken together, indicate that military personnel who are tried by courts-martial have a much more flexible direct appellate review system open to them that can correct errors committed at the trial level than do defendants who are tried in either a state or federal Article III court. Indeed, this fact and its relationship to collateral attacks on courts-martial convictions may be on the minds of the judges of the Court of Military Appeals. One of the hallmarks of the court under Chief Judge Everett has been its keen sense of fairness and desire to maintain the integrity of the military justice system. Through "Project Outreach" the Court of Military Appeals has been trying to make the public aware of the true nature of military justice today and to dispel the antiquated ideas many people have about the military criminal justice system. At a recent Joint-Service Appellate Workshop,[50] Chief Judge Everett indicated that he believed that collateral attacks on court-martial convictions are "few and far-between" these days.[51] The Chief Judge indicated that he believed this decrease in habeas corpus petitions over the last few years was attributable to an increase in the status, reputation, and perception of the military justice system and the Court of Military Appeals, and to some recent Supreme Court decisions.[52] Judge Cox also indicated his interest in the use of habeas corpus proceedings to attack court-martial convictions and pointed out that one of the reasons he supports decisions like his opinion in *Evans* is his concern that collateral attacks of courts-martial are not as readily available for military accused as they are for persons convicted in the criminal courts of the various states.[53]

In conclusion, collateral attacks on courts-martial convictions, primarily by the use of writs of habeas corpus, are still possible, although their availability has been curtailed by recent civilian court decisions. The burden is on trial defense counsel to preserve a client's ability to attack a court-martial conviction, both on direct appeal and collaterally, by recognizing or discovering constitutional or statutory problems that may afford the client some possible basis for relief. Once the potential error is discovered, it must be clearly and fully made a matter of record in order to preserve the client's ability to later raise the issue in an appropriate forum.

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[47] *Hilton*, 27 M.J. at 326 (citing United States v. Britton, 26 M.J. 24 (C.M.A. 1988)).

[48] Uniform Code of Military Justice art. 66(c), 10 U.S.C. § 866(c) (1982).

[49] *Evans*, 28 M.J. at 76.

[50] Joint-Service Appellate Workshop held at Andrews Air Force Base on 17-18 January 1990.

[51] While statistical data regarding the number of habeas corpus challenges to courts-martial convictions do not seem to be available from the various services, the research conducted by this author tends to support Chief Judge Everett's conclusions.

[52] *See supra* note 2 and accompanying text.

[53] *See supra* note 27.

DAD Notes

Well, Excuse Me!

"The Court is now assembled," declares the military judge. Those words signal a significant point in the trial. Assembly of the court marks the point after which excusal and substitution of court members and the military judge may no longer take place without good

cause.[1] Assembly ordinarily occurs immediately after the members are sworn[2] or immediately following approval of a request for trial by military judge alone.[3]

In a recent case, the Army Court of Military Review held that the military judge erroneously excused a member after assembly.[4] During voir dire, Major S, when asked by the military judge if there was any event that would prevent the members from giving their full attention to the proceedings, responded that he had a physical examination scheduled for the following day. The military judge, sua sponte, determined that it was in the best interests of both sides that Major S be excused. The government concurred; the defense neither concurred nor objected. After excusing Major S and another member who had been challenged for cause, the military judge announced that the court was assembled and proceeded with the trial.

On appeal, the Army court held that assembly of the court should have been announced prior to voir dire and challenges and that a routine medical doctor's appointment did not rise to the level of good cause required to excuse members after assembly.[5] Noting that participation in a classified mission in a combat zone would constitute good cause,[6] but that participation in a live-fire exercise by a chief of a firing battery[7] or departing on ordinary leave[8] would not, the Army court found that Major S's physical examination was nothing more than routine and did not rise to the level of physical disability or other good cause to justify excusal.[9]

Procedures for substituting members and military judges are governed by article 29,[10] R.C.M. 505, and R.C.M. 911. Members may be excused by the convening authority prior to assembly and may be replaced without cause provided they are detailed in accordance with R.C.M. 503. Excusal of court members without replacement need not be in writing, but should be announced on the record.[11] After assembly, members may only be excused by the convening authority or the military judge as a result of a challenge or for good cause shown on the record.[12] Similar restrictions apply for substituting military judges.[13]

Although R.C.M. 911 provides military judges some flexibility with respect to announcing the assembly of the court, the discretion is not limitless. In *United States v. Dixon*[14] the military judge recessed the court for the weekend after voir dire and challenges were completed. The court reconvened the following Monday with a new military judge detailed by the convening authority because the original judge had gone on leave. Over defense objection, the new military judge announced assembly of the court and proceeded to trial. The Court of Military Appeals held that even though the Manual did not *specifically* so provide, assembly occurred prior to voir dire and challenges, regardless of when announced by the military judge. The court "set aside any action which the court-martial took thereafter."[15]

Defense counsel should note that erroneous excusal of court members is ordinarily not a jurisdictional defect unless it rises to the level of a denial of due process.[16] The Army court established the following test for prejudice in *United States v. Alexander*: "Whether a violation of this right can be considered as harmless error depends on whether the change of membership is so substantial

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[1] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 505 [hereinafter R.C.M. 505]; R.C.M. 911 discussion.

[2] R.C.M. 911 discussion. *See* United States v. Dixon, 18 M.J. 310 (C.M.A. 1984).

[3] R.C.M. 911 discussion; Dep't of Army Pam. 27-9, Military Judges' Benchbook, para. 2-6 (1 May 1982) (C1, 15 Feb. 1985).

[4] United States v. Latimer, ACMR 8800843 (A.C.M.R. 28 Feb. 1990).

[5] *Latimer*, slip op. at 12, 15. Good cause is defined in R.C.M. 505(f) as "... physical disability, military exigency, and other extraordinary circumstances which render the member, counsel, or military judge unable to proceed with the court-martial within a reasonable time. 'Good cause' does not include temporary inconveniences which are incident to normal conditions of military life."

[6] *Latimer*, slip op. at 15 (citing United States v. Geraghty, 40 C.M.R. 499 (A.B.R. 1969)).

[7] *Id.* (citing United States v. Garcia, 15 M.J. 864 (A.C.M.R. 1983)).

[8] *Id.* (citing *Dixon*, 18 M.J. 310 (C.M.A. 1984); United States v. Boshears, 23 C.M.R. 737 (A.F.B.R. 1956)).

[9] Although finding error, the Army court ultimately ruled that the matter was not a jurisdictional issue, that appellant was not prejudiced, and that defense counsel's failure to object waived the error. *Latimer*, slip op. at 15, 17.

[10] Uniform Code of Military Justice art. 29, 10 U.S.C. § 829 (1982) [hereinafter UCMJ].

[11] R.C.M. 505(b) discussion. The convening authority may delegate the authority to excuse members to the staff judge advocate or other legal officer or principal assistant to the convening authority, however, this delegatee may not excuse more than one-third of the total number of members detailed by the convening authority. R.C.M. 505(c)(1)(B)(ii).

[12] R.C.M. 505(c)(2)(A)(i)(ii), and (iii).

[13] R.C.M. 505(e).

[14] 18 M.J. 310 (C.M.A. 1984).

[15] *Id.* at 314.

[16] *See* United States v. Colon, 6 M.J. 73 (C.M.A. 1978) (four of ten members absent without an accounting on the record was a denial of due process); *but see* United States v. Benoit, 21 M.J. 579 (A.C.M.R. 1985) (defense counsel's failure to object to absence of five of thirteen members accounted for on the record waived the error).

that it does not represent the court contemplated by the convening authority."[17]

Defense counsel should be alert for changes in court members and military judges that occur after voir dire in trials with members and after arraignment in cases tried by military judge. Counsel must object, demonstrate prejudice to their clients,[18] and argue that good cause has not been established. Failure of the government to establish such cause on the record may require that any subsequent action of the court-martial be set aside on appeal.[19] Captain James Kevin Lovejoy.

"Knowingly" Waiving Rights and Other Amusing Assumptions

In the recent case of *United States v. McDowell*[20] the Army Court of Military Review upheld the conviction of an accused who pleaded guilty despite the fact that the military judge failed to advise the accused of his fifth and sixth amendment rights during the providence inquiry. This decision substantially undermines the requirements of Rule for Courts-Martial 910(c)[21] and weakens the impact of *United States v. Care*.[22] Based on the holding in *Care*, Rule for Courts-Martial 910(c) requires that the military judge advise an accused who pleads guilty about the waiver of his constitutional rights to trial of the facts by court-martial, to confront the witnesses against him, and against self-incrimination. In *McDowell* the Army court stressed that *Care* and subsequent Army court decisions did not mandate a per se requirement that military judges enunciate each right an accused waives by a guilty plea.[23] The court held that where the record establishes that a guilty plea was voluntary and informed, the accused would not be prejudiced by a judge's "failure to make a rote recitation of [the accused's] fifth and sixth amendment rights."[24]

The court in *McDowell* viewed "voluntary and informed" with an emphasis on the former. The court opined that the military judge "intended to advise the appellant [of his rights] ... and in fact thought that he had done so."[25] While the accused never expressly waived his constitutional rights or stated that he understood them, the court noted that the providence inquiry covered every other required topic. In finding that the accused's plea was voluntary, the court noted that the accused's decision to plead guilty was made prior to hearing his attorney's advice on his plea.

The court also noted the absence of a defense objection to the military judge's finding that the accused "knowingly, intelligently, and consciously" waived his constitutional rights. The court pointed out that "[n]either appellant nor trial defense counsel objected ... nor did either seek clarification or ask for further information or explanation."[26] From this the Army court concluded: "It is clear that appellant's pleas of guilty were voluntarily and understandingly made."[27] This rationale, which implies waiver, appears contrary to the Army court's decision in *United States v. Harris*.[28]

In order to find waiver of an accused's constitutional rights, the court in *Harris* required "an intentional relinquishment of a known right or privilege."[29] Moreover, the court found the rights so important to the concept of fairness in criminal trials that only an accused can waive those rights and this affirmative act must be on the record.[30]

It is a defense counsel's duty to ensure that an accused understands the "costs" of his guilty plea prior to trial. The *McDowell* decision, if not reversed at some point by the Court of Military Appeals, reflects an increased importance of this duty because there is, evidently, no longer the need for the military judge to inform an accused on the record specifically concerning his or her rights and exactly what the accused relinquishes by a plea of guilty. Implicit in the holding in *McDowell* is that when the record as a whole indicates that an accused's plea of guilty is voluntary, the plea will be presumed by reviewing courts to be an informed one, absent evidence to the contrary. Captain Jeannine C. Hinman.

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[17] 27 M.J. 834 (A.C.M.R.), *pet. denied*, 28 M.J. 354 (C.M.A. 1989).

[18] Prejudice is not only a function of the number of members excused, but may also arise from excusal of a single member on the basis of gender, race, rank, background, education, or any other unique circumstance.

[19] *Dixon*, 18 M.J. 310 (C.M.A. 1984).

[20] ACMR 8900798 (A.C.M.R. 27 Feb. 1990) (unpub.).

[21] R.C.M. 910(c).

[22] 40 C.M.R. 247 (C.M.A. 1969).

[23] *McDowell*, slip op. at 1-2.

[24] *Id.* at 4. The military judge in *McDowell* made no recitation of the accused's rights. Such an omission was sufficient to set aside a plea of guilty in United States v. Bailey, 20 M.J. 703 (A.C.M.R. 1985). The *Bailey* case was cited but not distinguished in the *McDowell* opinion.

[25] *McDowell*, slip op. at 3.

[26] *Id.*

[27] *Id.*

[28] 26 M.J. 729 (A.C.M.R. 1988).

[29] *Id.* at 733.

[30] *Id.*

The Multiplicity Melee: Relief in Sight?

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Introduction

It is 1990. Nuclear physicists, working with massive machines that accelerate subatomic particles to incredible speeds, are zeroing in on the fundamental building blocks of matter.[1] Astronomers are searching for "dark matter"—the invisible mass that somehow keeps stars from drifting apart.[2] Medical researchers are searching for a cure for the Acquired Immunodeficiency Syndrome virus. And practitioners of military criminal law are struggling to understand the multiplicity doctrine.

It is safe to say that most of us are confused. We know that two charges are multiplicitous for findings if they arise out of the same transaction and

> either (a) one of the charges necessarily included all the elements of the other, or (b) the allegations under one of the charges, as drafted, "fairly embraced" all the elements of the other.[3]

We are told that an offense is a lesser included offense of another offense if: 1) "one offense contains only elements of, but not all the elements of the other offense"; or 2) the "offense contains different elements as a matter of law from the other offense, but these different elements are fairly embraced in the factual allegations of the other offense and established by the evidence."[4] Despite years of precedent, however, we are not sure what "fairly embrace" means.[5] Our approach to multiplicity issues, therefore, is ad hoc. We search the plethora of multiplicity cases hoping to find one on point.[6] If we do not find one on point, we fashion an argument, unsure whether our concept of the *Baker* test will coincide with the military judge's or reviewing court's understanding of that test.

United States v. Stottlemire[7] may be the harbinger of the end to our confusion. In *Stottlemire* the Court of Military Appeals significantly departed from its precedents by applying the *Blockburger*[8] test for multiplicity. The court eschewed the "fairly embrace" test and held that offenses of conspiracy to commit larceny of government funds and attempted larceny of those same funds were not multiplicitous for findings because the offenses were "separate under the '*Blockburger* Rule.'"[9] This article analyzes *Stottlemire* with a view toward assessing whether it signals the beginning of the end of the vexatious *Baker* test for multiplicity.

Facts

Private E2 (PV2) John Stottlemire was a finance clerk assigned to the 5th Corps Finance Group at Frankfurt, Germany. Among other things, he was charged with attempting to steal over 229,000 Deutsche marks (in the

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[1] *See* Booth, *Hunting a Holy Grail in Cosmic Collisions*, Washington Post, Feb. 19, 1990, at A3; Booth, *Battling Scientists Agree on the Nature of Matter*, Washington Post, Oct. 14, 1989 at A4.

[2] *See* B. Parker, Invisible Matter and the Fate of the Universe (1989).

[3] United States v. Holt, 16 M.J. 393, 394 (C.M.A. 1983) (citing United States v. Baker, 14 M.J. 361, 368 (C.M.A. 1983)). A full explanation of the *Baker* multiplicity test and of cases interpreting that test is beyond the scope of this article and, frankly, beyond the comprehension of this writer.

[4] *Baker*, 14 M.J. at 368.

[5] *See* McAtamney, *Multiplicity: A Functional Analysis*, 106 Mil. L. Rev. 115, 146-50 (1984) (discussing the confusion); *see also* United States v. Hollimon, 16 M.J. 164, 167-68 (Cook, J., concurring in part, dissenting in part) (describing the "fairly embrace" test as a "'gut' test").

[6] A measure of the frustration in this area is found in the periodic multiplicity updates published in *The Army Lawyer*. *See, e.g.*, Raezer, *Trial Counsel's Guide to Multiplicity*, The Army Lawyer, Apr. 1985 at 21; Ryan, *Multiplicity Update*, The Army Lawyer, Jul. 1987, at 29; Sieg, *Multiplicity Update*, The Army Lawyer, Jan. 1990, at 19; *see also* Cunningham, *The Blockburger Rule: A Trial by Battel*, The Army Lawyer, Jul. 1986, at 57.

[7] 28 M.J. 477 (C.M.A. 1989).

[8] Blockburger v. United States, 284 U.S. 299 (1932). The *Blockburger* rule, discussed more fully later in the text, is that offenses are separate where each requires proof of a fact or element which the other does not. The rule is a guide to determining whether the legislature intended separate convictions and punishment. The Supreme Court does not grapple with multiplicity for sentencing and multiplicity for findings. Rather, the Court dispenses with the "distinction" by logically stating: "Congress does not create criminal offenses having no sentencing component." Ball v. United States, 470 U.S. 856, 861 (1985) (citations omitted).

[9] *Stottlemire*, 28 M.J. at 480 (citing United States v. Savaino, 843 F.2d 1280 (10th Cir.), *cert. denied*, 109 S. Ct. 99 (1988)). In *Savaino* the court held that offenses of conspiracy to manufacture amphetamine and attempt to manufacture amphetamine are separate and may be separately punished. The court applied the *Blockburger* rule. *Id.* at 1292-93.

form of a check) from the United States and conspiring with a friend, William Anselmo, to steal that amount.[10] The conspiracy specification alleged that on or about 23 April 1987, PV2 Stottlemire and Mr. Anselmo took the following steps in furtherance of their conspiracy to steal the money: 1) PV2 Stottlemire "provided and helped William A. Anselmo fill out a change of address card to route [the check] to William A. Anselmo's address"; 2) Mr. Anselmo "did fill out and file [the card] with the Bundespost"; and 3) Mr. Anselmo "opened up a bank account ... in order to deposit the said check."[11] The attempted larceny specification alleged that on the same date appellant attempted to steal the money by "preparing and submitting a fraudulent invoice" and by "preparing and submitting a fraudulent change of address form" (not the same change of address card mentioned in the conspiracy specification).[12]

At trial, defense counsel did not move to dismiss either specification as being multiplicitous for findings. Indeed, defense counsel conceded that the offenses were not multiplicitous for findings.[13] He argued that the offenses were multiplicitous for sentencing. The military judge agreed that the charges were multiplicitous for sentencing and so instructed the panel members.[14]

Before the Court of Military Appeals, Stottlemire argued that the charges were multiplicitous for findings.[15] Relying upon *Baker*, he argued that the conspiracy specification fairly embraced the attempted larceny specification because the overt acts in furtherance of the conspiracy included the overt acts tending to effect the larceny. All of these acts, Stottlemire argued, were part of one scheme to steal the money. The government responded with three arguments. First, government counsel argued that Stottlemire waived the issue of multiplicity for findings by failing to raise (indeed conceding) that issue at trial. Second, counsel argued that the offenses were not multiplicitous under *Blockburger* and *Baker*. Third, the government argued that even if the offenses were multiplicitous, Stottlemire suffered no prejudice because the military judge instructed the members that the offenses were multiplicitous for sentencing.[16]

Decision

The Court of Military Appeals, in an opinion by Judge Sullivan, held that "these offenses were not multiplicious for findings."[17] The court followed this pronouncement with a citation to two cases: 1) *United States v. Marden*,[18] where the Fifth Circuit held that offenses of conspiracy to import a shipload of marijuana and attempt to import the same shipload were not multiplicitous[19] under *Blockburger*; and 2) *United States v. Baker*, where the Court of Military Appeals set forth its "fairly embrace" test for multiplicity. The remainder of the opinion shows that the reference to *Baker* is meaningless.

The court began its analysis by noting that "[o]ne transaction is involved here [citing *Baker*[20]], yet two different statutes are alleged to have been violated."[21] From that, the court concluded that the appropriate test for multiplicity was to ask whether Congress had authorized separate convictions for the offenses. For this proposition, the court cited a very recent Court of Military Appeals case that employed that test,[22] two Supreme

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[10]The facts are taken from the court's opinion. *Stottlemire*, 28 M.J. at 477-78.

[11]*Id.* at 478.

[12]*Id.* at 478, 480 n.3.

[13]*Id.* at 478.

[14]The opinion does not mention the instruction, but the record shows that the military judge appropriately instructed the members on the diminished maximum punishment based on the multiplicity ruling.

[15]PV2 Stottlemire did not raise the issue of multiplicity before the Army Court of Military Review.

[16]The foregoing is a summary of the final briefs.

[17]*Stottlemire*, 28 M.J. at 477.

[18]872 F.2d 123 (5th Cir. 1989).

[19]Actually, the court held that the separate convictions and punishments were not barred by the fifth amendment's double jeopardy clause. Most federal multiplicity cases are decided on this ground. *See generally* 57 West's Federal Practice Digest, *Indictments and Informations*, § 126-130 (3d ed. 1985).

[20]A single transaction, according to *Baker*, is "a series of occurrences or an aggregate of facts which are logically related to a single course of criminal conduct" *Baker*, 14 M.J. at 366.

[21]*Stottlemire*, 28 M.J. at 478.

[22]United States v. Guerrero, 28 M.J. 223 (C.M.A. 1989). Guerrero was convicted of two specifications of obstruction of justice stemming from one conversation he had with two witnesses. The court held that the offenses were multiplicitous because the "purpose of the military obstruction-of-justice prohibition is not protection of the individual witnesses or potential witnesses." *Id.* at 227. The court applied the "Supreme-Court-approved rule of lenity" and, somewhat inconsistently, found that "Congress intended a single offense to exist on these facts." *Id.* (citations omitted). *See infra* note 36 and accompanying text (discussing the circumstances in which the rule of lenity should apply).

Court cases,[23] and, oddly enough, *Baker*.[24] Of course nothing in *Baker* suggests that the Court of Military Appeals adopted the congressional intent test for multiplicity.[25] Indeed, as Judge Cook noted in his dissent in *Baker*, the congressional intent test is, in essence, the *Blockburger* test—the test that the *Baker* majority specifically rejected.[26] The Court of Military Appeals reiterated its rejection of the *Blockburger* rule in 1986, in a case where the Navy-Marine Corps Court of Military Review had the temerity to hold that the *Blockburger* rule was the test for multiplicity adopted in the 1984 Manual for Courts-Martial.[27] Given this background, the reference to *Baker* is, at best, superfluous.

Any doubt about the validity of this observation vanishes when one considers the court's application of the congressional intent test for multiplicity. There is no mention of *Baker* and nothing resembling its "fairly embrace" test for multiplicity. First, the court examined the language and history of articles 80 and 81. From the language, the court concluded that each statute "could be applied to a single course of criminal conduct."[28] From the sparse legislative history of the statutes, the court concluded that it was not clear whether Congress intended "an accused to be found guilty under both statutes for different preliminary acts leading to the same substantive crime."[29] Thus the court turned to the "'*Blockburger* rule' as a guide to legislative intent."[30]

In *Blockburger* the Court established a straightforward rule for determining whether the same act or series of acts in one transaction can be separately punished. In often repeated language the Court stated:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.[31]

Applying this rule, the Court held that Blockburger's separate convictions—one for violation of a statute that prohibited the sale of morphine that was not in the original package and one for violation of a statute that

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[23] United States v. Halper, 109 S. Ct. 1892 (1989); Ball v. United States, 470 U.S. 856 (1985). *Halper* involved the question whether an individual who had been convicted of submitting 65 false medicare claims (totalling $585.00) could be required to pay the government $130,000.00 in a subsequent civil action under the False Claims Act. The Act provides for a civil penalty of $2,000.00 for each false claim. The Court held that the civil penalty was so extreme and unrelated to the government's actual damages that it could be a prohibited second punishment within the meaning of the double jeopardy clause of the fifth amendment. The Court remanded the case to the trial court, where the government would have the opportunity to show the actual costs of Halper's fraud. In footnote 10 of the opinion the Court noted that a "legislature may authorize cumulated punishment under two statues for a single course of conduct, the multiple-punishment inquiry in the context of a single proceeding focuses on whether the legislature actually authorized the cumulative punishment." *Halper*, 109 S. Ct. at 1903 n.10 (citation omitted). In *Ball* the Court held that separate convictions for possession of a handgun and receipt of that handgun, under statutes prohibiting such conduct by a convicted felon, could not stand because Congress did not intend two convictions in that circumstance. The Court applied the *Blockburger* test and reasoned that because one cannot possess a handgun without receiving it, the statutes do not require proof of different facts. *Cf.* United States v. Zubko, 18 M.J. 378 (C.M.A. 1984) (possession and distribution of drugs are multiplicitous because, given the definitions of these terms, possession is a lesser included offense of distribution).

[24] *Stottlemire*, 28 M.J. at 478.

[25] To be sure, the *Baker* court noted the general rule that an accused may be found guilty of multiple offenses arising from one transaction if the legislature so intended. The court stated, however, that this general rule is not "without exceptions and it must be viewed in the context of the Constitution and the Uniform Code of Military Justice." *Baker*, 14 M.J. at 367. Experience has taught us that the exceptions (notably the "fairly embrace" rule) eviscerate the rule.

[26] *Baker*, 14 M.J. at 371, 373 (Cook, J., dissenting) (describing the *Blockburger* rule as a rule of statutory construction used to discern congressional intent); *see also Baker*, 14 M.J. at 370-71 (Everett, C.J., concurring) (expressing a preference for the "mess" created by the court's multiplicity decisions over the "simplicity of the *Blockburger* rule").

[27] United States v. Jones, 23 M.J. 301 (C.M.A. 1987). In *Jones* the court held that the accused waived his multiplicity claim by failing to raise it at trial and because the language of the specifications did not indicate that the charges fairly embraced each other. Judge Cox concurred in the result, noting simply that "[l]arceny is neither the same offense as uttering a forged instrument nor an offense necessarily included in the other." *Id.* at 304 (Cox, J., concurring in the result). For some reason, he did not reiterate his view that *Blockburger* should be the rule in the military. *See* United States v. Mullins, 20 M.J. 307, 307-308 (Cox, J., concurring in the result) (noting and applying the "time-honored '*Blockburger*' analysis" and stating that failure to follow that analysis "appears to be the law of only this jurisdiction").

[28] *Stottlemire*, 28 M.J. at 478-79 (citing United States v. Touw, 769 F.2d 571 (9th Cir. 1985)). In *Touw* the court pertinently held that one can be convicted of conspiracy to purchase marijuana and attempting to purchase the same marijuana.

[29] *Stottlemire*, 28 M.J. at 479.

[30] *Id.*

[31] *Blockburger*, 284 U.S. at 304. The Supreme Court has consistently and repeatedly relied upon the *Blockburger* rule. *See, e.g.*, Gore v. United States, 357 U.S. 386 (1985); Albernaz v. United States, 450 U.S. 333 (1981), Missouri v. Hunter, 459 U.S. 359 (1983); United States v. Woodward, 469 U.S. 105 (1985); Whalen v. United States, 445 U.S. 684 (1980); Ball v. United States, 470 U.S. 856 (1985); Ohio v. Johnson, 467 U.S. 493 (1984). The Court recently granted the state's petition for review in a case where the Court of Appeals of New York held that the *Blockburger* rule did not allow separate convictions for traffic offenses and vehicular homicide arising out of one incident. Grady v. Corbin, 110 S. Ct. 362 (1989) (grant of review). The lower court decision is reported at 543 N.E.2d 714 (N.Y. 1989).

prohibited the sale of the drug without a written order from the purchaser—could be separately punished. This was true even though the violations stemmed from one sale of morphine to one customer.[32]

Of course, PV2 Stottlemire's claim was doomed once the Court of Military Appeals decided to apply *Blockburger*. The court compared the elements of conspiracy to commit an offense with the elements of attempt to commit an offense and noted that the elements were different in two respects. Conspiracy requires proof of an agreement with another to commit an offense and attempt does not include this element. Moreover, the overt acts required to show attempt must "amount to more than mere preparation" and "tend to effect the commission of the intended" offense, while the overt acts required to prove a conspiracy need only be done with the intent to bring about the "object of the conspiracy."[33] Therefore, the court concluded that PV2 Stottlemire's offenses were separate.

Impact

Stottlemire "seems" to establish a new approach to multiplicity. The court recognized that the predicate for application of the *Baker* test for multiplicity was present (i.e., PV2 Stottlemire's offenses were part of one transaction), yet the court did not apply that test. In particular, the court did not hold that PV2 Stottlemire waived the issue of multiplicity by failing to raise it at trial—a holding dictated by established precedent.[34] Instead, the court looked to congressional intent and asked whether PV2 Stottlemire's separate convictions violated the intent of Congress. Consistent with established Supreme Court precedent, the Court of Military Appeals applied the *Blockburger* rule as a guide to determining legislative intent. The *Stottlemire* test for multiplicity can be summarized as follows. First, one examines the language of the statutes and their legislative history. If the language or history makes it clear that separate convictions under the statutes for one course of conduct are not intended, then the offenses are multiplicitous.[35] If the language or history is ambiguous on that question, the court will apply a rule of lenity and hold that the offenses are multiplicitous.[36] If the language or history indicate that Congress intended separate convictions, the offenses are not multiplicitous. If the language and history do not speak to the question (as in *Stottlemire* and most other cases), the *Blockburger* rule is controlling.

The word "seems" is emphasized in the above paragraph for two reasons. First, the court did not specifically reject the *Baker* test. Given the confusion in this area of the law and the court's references to *Baker* in its opinion, it is not clear whether *Stottlemire* is a panacea or an aberration.

Second, the court's parting dicta seems to undermine much of what the court stated in the rest of its opinion. The court noted the following in its penultimate paragraph:

> Of course, it could be argued that in certain cases the overt act pleaded and proven for the attempt could also suffice as the overt act required for the conspiracy. *See United States v. McQuisten*, 795 F.2d 858, 870 (9th Cir. 1986) (Reinhardt, J., dissenting). However, this was not done in the present case because the overt acts alleged and proven in each charge were clearly different. Accordingly, we have no cause to apply the "fairly embraced" aspect of the decision of this court in *United States v. Baker, supra*.[37]

This dicta makes no sense. Why would a different *test* for multiplicity apply depending upon the language of the specifications? The court seems to be telling us that the congressional intent test does not replace the *Baker* test. Instead, it is yet another multiplicity test to be applied in situations where *Baker* and its progeny would dictate that the accused waived multiplicity.[38] One can debate whether charges of attempt and conspiracy based on allegations detailing identical overt acts are multi-

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[32] *Blockburger*, 284 U.S. at 301-02.

[33] *Stottlemire*, 28 M.J. at 479.

[34] *See* United States v. Jones, 23 M.J. 301 (C.M.A. 1987); United States v. Holt, 16 M.J. 393, 394 (C.M.A. 1983) (both applying waiver to multiplicity claims made for the first time on appeal where the language of the specifications did not fairly embrace each other).

[35] *See* Albernaz v. United States, 450 U.S. 333, 337-44 (1981) (noting the primacy of the language of the statute in determining legislative intent and noting that *Blockburger* does not control where the legislature's intent is clear); *see also* United States v. *Turkette*, 452 U.S. 576, 580, 593 (1981) (language of the statute is the most reliable evidence of legislative intent).

[36] *See Guerrero*, 28 M.J. 223 (C.M.A. 1989). The rule of lenity is well-established in federal law. *See, e.g.*, Bell v. United States, 349 U.S. 81, 83 (1955) (simultaneous transport of two women in violation of Mann Act was punishable only once as congressional intent was ambiguous, and ambiguity "resolved in favor of lenity"); *Albernaz*, 450 U.S. at 342 (commenting that the rule of lenity only applies where legislative intent is ambiguous).

[37] *Stottlemire*, 28 M.J. at 480 (footnote omitted).

[38] *See supra* note 34.

plicitous under the congressional intent test[39] and the *Baker* test, but it is difficult to see why the language of the specifications controls which test applies. We can only hope that the *Stottlemire* dicta will not be followed.

Conclusion

Stottlemire may be an important case. The court applied the congressional intent test for multiplicity and found that two offenses were not multiplicitous for findings. The court did not apply the *Baker* test even though application of that test, as developed in *Holt*, would have led to a similar outcome—defeat of Stottlemire's claim. One might conclude, therefore, that at last the court has jettisoned the *Baker* test. The Court of Military Appeals, however, makes several unexplained and perhaps unexplainable references to *Baker*. Notwithstanding these references, for those of us who wrestle with multiplicity, *Stottlemire* is a welcome addition to the melee. It may not end the melee, but the possibility that it is the beginning of the end is a glimmer of hope where pessimism has ruled.

[39] *Compare Savaino*, 843 F.2d 1280 (10th Cir. 1988) *with* United States v. McQuisten, 795 F.2d 858, 870 (9th Cir. 1986) (Reinhardt, J., dissenting). In *Savaino* the Tenth Circuit held that attempt and conspiracy involving the same acts may be punished separately. The court reasoned that "[o]nce conspiracy and attempt are identified as separate crimes, separate punishment follows, just as separate punishments may be imposed for convictions on conspiracy and the completed crime." *Savaino*, 843 F.2d at 1293 (citation omitted). In *McQuisten* the Ninth Circuit held that a conspiracy followed by a separate attempt "constitute separate punishable offenses." *McQuisten*, 795 F.2d at 868. The dissenting judge disagreed, finding that the legislative history did not support a view that Congress intended separate punishments for attempt and conspiracy and arguing that the court should apply the rule of lenity. *Id.* at 869-70 (Reinhardt, J., dissenting). Interestingly, *Savaino* and the dissenting opinion in *McQuisten* are cited in *Stottlemire*. *Savaino* is cited in the main part of the opinion, and *McQuisten* is cited in the parting dicta. *See Stottlemire*, 28 M.J. at 480.

Batson: Beginning of the End of the Peremptory Challenge?

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Rule for Courts-Martial 912(g)(1), Manual for Courts-Martial, United States, 1984:

> (g) Peremptory challenges.
>
> (1) Procedure. Each party may challenge the member peremptorily. Any member so challenged shall be excused. No party may be required to exercise a peremptory challenge before the examination of members and determination of any challenges for cause has been completed. Ordinarily the trial counsel shall enter any peremptory challenge before the defense.

Rule for Courts-Martial 912(g)(1), Manual for Courts-Martial, United States, 1994:

> (g) Peremptory challenges.
>
> *Rescinded.*

Is this the future of the peremptory challenge?

Introduction

Many military trial attorneys will remember a time, not too long ago, when they routinely exercised their one peremptory challenge at trial in order to alter the make-up of the panel. Some played the "numbers game";[1] they viewed the peremptory challenge as a means of altering the number of panel members in order to facilitate either conviction or acquittal, depending on whether they represented the government or the accused. As part of the "numbers game," or without any regard for it, the defense would typically strike the senior member of the panel and the government would exclude the junior one. But the level of experience was only one of several factors in deciding how to excercise the peremptory challenge. Extra-judicial contact with a prospective panel member may have left counsel with the distinct

[1] This game is based on the belief that the numerical composition of the court may affect the outcome of a close case. Thus, one side tries to gain a tactical advantage over the other by challenging or retaining court members. *See* United States v. Fetch, 17 C.M.R. 836 (A.F.B.R. 1954).

impression that the member could not be fair, reasonable, or capable of using common sense to arrive at a verdict. Perhaps the voir dire itself revealed reasons to strike a member that did not rise to the level of a challenge for cause.[2]

Many counsel studied questionnaires completed by the prospective panel members.[3] Counsel may decide to strike a member because of that member's education, work experience, family composition, or other similar factor. Counsel applied their knowledge of "the ways of the world" to determine whether their composite picture of the member, as provided by the questionnaires, revealed a reason to strike.

On the other hand, some counsel struck prospective members for reasons that defy articulation. They might have had a "hunch" about a particular member. It might be no more than the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another."[4] Of course, counsel did not have to give a reason for their peremptory challenge. This feature made the peremptory challenge a valuable commodity when it was used thoughtfully and properly.

Recently, however, the face of voir dire has changed. The peremptory challenge of old is gone. Exercise of the peremptory challenge in courts-martial is now subject to one significant exception: the government's peremptory challenge of a member of the accused's race must be explained by the trial counsel upon timely objection by the accused.

This rule resulted from the United States Supreme Court's decision in *Batson v. Kentucky*,[5] as applied to the military by the United States Court of Military Appeals in *United States v. Santiago-Davila*.[6] The rule will undoubtedly change the way many counsel prepare for and conduct voir dire. Maybe it will turn the peremptory challenge into a quasi-challenge for cause. After all, if trial counsel must *explain* a peremptory challenge, then it ceases to be a true "*peremptory* challenge." While the rule currently applies only to trial counsel, it is possible that it will eventually be expanded to include defense counsel as well.

The new constitutional limitation on the peremptory challenge may cause concern for its military proponents. Does the *Batson-Santiago-Davila* rule mark the beginning of the end of the peremptory challenge? Has this constitutional limitation rendered the peremptory challenge more trouble than it's worth? In addressing these questions, this article will review *Batson* and its military progeny with a view toward providing some practical hints for trial counsel who face a *Batson* issue. It will then consider the "reverse-*Batson*" situation, in which *Batson* is applied to the defense.

Abuse of the Peremptory Challenge: *Swain* and *Batson*

Several years ago, while military judges routinely granted peremptory challenges without question or concern, the civilian courts grappled with an improper use of the peremptory challenge. In California[7] and Massachusetts,[8] the high courts held that the use of peremptory challenges by the prosecution to remove prospective jurors on the basis of group bias violated their state constitutions. Both states guaranteed criminal defendants a right to trial by a jury drawn from a representative cross section of the community. In both instances, the prosecution used its peremptory challenges to exclude black jurors from the panel charged with hearing the state's case against black defendants. Other state courts made similar findings on similar facts.[9]

The Supreme Court also addressed the improper use of the peremptory challenge in two major cases: *Swain v. Alabama*[10] and *Batson v. Kentucky*.[11] But the focus of the Supreme Court's attention in these cases was not on an alleged violation of the defendant's sixth amendment right to an impartial jury and hence, a jury composed of

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[2] For example, the member has had prior contact of an adverse nature with a witness or the accused that he has all but forgotten. No matter how honest, sincere, or reassuring the panel member may be in responding to the questions of counsel and the military judge, the accused is unconvinced that the member will be impartial and the accused demands that his defense counsel "do something about it."

[3] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 912(b)(1) [hereinafter R.C.M.].

[4] 4 W. Blackstone, Commentaries 353 (1807).

[5] 476 U.S. 79 (1986).

[6] 26 M.J. 380 (C.M.A. 1988).

[7] People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

[8] Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979).

[9] State v. Neil, 457 So.2d 481 (Fla. 1984); Riley v. State, 496 A.2d 997 (Del. 1985), *cert. denied*, 478 U.S. 1022 (1986); State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986).

[10] 380 U.S. 202 (1965).

[11] 476 U.S. 79 (1986).

persons representing a fair cross section of the community.[12] Instead, the Court's concern was whether the defendant was denied fourteenth amendment equal protection of the laws through the state's use of peremptory challenges to exclude members of the defendant's race from the jury.[13]

In *Swain* a black man was convicted of rape and was sentenced to death. The record disclosed that the prosecutor used the state's peremptory challenges to strike all six black people who had been selected as potential jurors.[14] The Court noted that although a black defendant is not entitled to a jury containing members of his race, purposeful exclusion of blacks from jury participation because of their race violates the equal protection clause.[15] Nevertheless, the Court ruled against Swain because he failed to show that over a period of time the prosecutor "systematically" used his peremptory challenges to exclude blacks from participation as jurors. Swain was not permitted to rely on the unique facts of his own case to establish purposeful discrimination by the state.

Essentially, the Court weighed the value of the peremptory challenge against the claim that its abuse violated the Constitution. The Court traced the history and purpose of the peremptory challenge. It recognized the peremptory challenge as "one of the most important rights secured to the accused."[16]

The Court emphasized the prosecutor's right to use the peremptory challenge.[17] In so doing, it concluded that the prosecutor must be presumed to be using the state's challenges in order to obtain a fair and impartial jury to try its case. The Court refused to inquire into the prosecutor's motives for exercising his peremptory challenges in Swain's case. In the Court's view, application of equal protection standards to the peremptory challenge posed a threat to the very nature and existence of peremptory challenges.[18]

Twenty-one years later, in a very changed society, the Supreme Court took a different view. The Court held that the state's privilege to strike individual jurors through peremptory challenges is subject to the mandates of the equal protection clause. In *Batson* a black man stood trial in Kentucky for second-degree burglary and receipt of stolen goods. The prosecutor used his peremptory challenges to strike all four prospective black jurors. An all-white jury convicted Batson, and the Supreme Court of Kentucky affirmed the conviction.

At the United States Supreme Court, Batson argued that the prosecutor's conduct violated his rights under the sixth and fourteenth amendments to an impartial jury and to a jury drawn from a cross section of the community. He did not make an equal protection claim. Nevertheless, the Court decided his case on equal protection grounds.

The Court noted that racial discrimination by the state in jury selection does more than harm the defendant. It harms the excluded juror, who also becomes a victim of unconstitutional discrimination. It also harms the community by undermining public confidence in the fairness of our justice system.

While the Court held that the state's use of the peremptory challenge must yield to the mandates of the equal protection clause, it expressly declined to consider whether the Constitution limits the defendant's exercise of the peremptory challenge. Thus, the Court clearly intended to benefit the defendant, not the state.

The aggrieved defendant cannot sit idly by, however, if he falls victim to an abuse of the peremptory challenge. He must at least make a prima facie showing of purposeful discrimination. Unlike the strict requirement of *Swain*, however, he is entitled to rely solely on the facts of his own case; he need not show a pattern of discrimination by the prosecutor over a period of time.

In order to establish a prima facie case, the defendant must show that he is a member of a "cognizable racial group" and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's group. The defendant is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits "those to discriminate

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[12]Taylor v. Louisiana, 419 U.S. 522 (1974).

[13]The Supreme Court's decision in *Swain* predated the two major State court decisions, although the California Supreme Court expressly rejected *Swain*. *Wheeler*, 583 P.2d at 768. While not expressly rejecting *Swain*, the Massachusetts court chose to go its own way as well. *Soares*, 387 N.E.2d at 514.

[14]In addition, the record disclosed that, although there had been "an average of six to seven Negroes on petit jury venires in criminal cases, no Negro has served on a petit jury since about 1950." *Swain*, 380 at 205.

[15]380 U.S. at 204. *See also* Strauder v. West Virginia, 100 U.S. 303 (1880).

[16]380 U.S. at 219 (citing Pointer v. United States, 151 U.S. 396 (1894)).

[17]"Although historically the incidence of the prosecutor's challenge has differed from that of the accused, the view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'" 380 U.S. at 220 (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887)).

[18]380 U.S. at 222.

who are of a mind to discriminate."[19] The defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used the practice to exclude the veniremen[20] from the petit jury[21] because of their race.

The trial court must then decide if the defendant has made a prima facie case of discrimination. If the defendant makes his showing, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors."[22] Although the prosecutor's explanation need not rise to the level of a reason justifying a challenge for cause, the prosecutor cannot rebut the defendant's case by merely explaining that he assumed or intuited that the challenged jurors would be partial to the defendant because of their shared race. Nor can the prosecutor merely deny that he had a discriminatory motive or "affirm [his] good faith in making individual selections."[23]

The Court reversed and remanded *Batson* to the trial court for further proceedings under the newly-established rules. The Court's ruling altered the standing of the peremptory challenge in traditional legal practice by subjecting it to constitutional limitations. While these results were acceptable to many on the Court, they were by no means acceptable to all.

For example, Justice Marshall, in his concurring opinion, advocated the total elimination of peremptory challenges in criminal cases.[24] His recommendation stemmed from his belief that the potential for racial discrimination is inherent in the peremptory challenge, whether it is exercised by the state or by the defendant. The peremptory challenge may have "very old credentials" and may be considered by many to be a necessary part of trial by jury. Nevertheless, Justice Marshall relied on those cases in which the Supreme Court stated that the right of peremptory challenge is not of constitutional magnitude and may be withheld without impairing the constitutional guarantee of an impartial jury and fair trial.[25]

Chief Justice Burger dissented. He argued that the majority went out of its way to "set aside the peremptory challenge, a procedure which has been part of our jury system for nearly 200 years."[26] He pointed out that in spite of the fact that the petitioner did not raise an equal protection claim, the Court nevertheless decided the case on equal protection grounds. The Court's action represented a dramatic departure from its normal procedure.[27] Addressing the result in the case, Chief Justice Burger noted that the majority limited its new rule to allegations of improper challenge on the basis of race alone, thus ignoring other classifications of individuals who might have standing to make equal protection claims. Moreover, the Court never applied conventional equal protection principles to the case at bar.[28] The Chief Justice further opined that the Court's ruling will inevitably lead to a limitation on the use of peremptory challenges by the defense. "Once the Court has held that *prosecutors* are limited in their use of peremptory challenges, could we rationally hold that defendants are not?"[29] The peremptory challenge would cease to function as a peremptory: "Analytically, there is no middle ground. A challenge either has to be explained or it does not. It is readily apparent, then, that to permit inquiry into the basis for a peremptory challenge would force 'the peremptory challenge [to] collapse into the challenge for cause.'"[30]

Chief Justice Burger foresaw problems in distinguishing explanations for the peremptory challenge from those that support a challenge for cause. He foresaw problems for the trial courts attempting to implement the Supreme Court's new rules. This included an observation that the ruling would stretch out criminal trials that are already too long, turning "the voir dire into a Title VII proceeding in miniature."[31] The Chief Justice also voiced

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[19] 476 U.S. at 96 (citing Avery v. Georgia, 345 U.S. 559, 562 (1953)). "Cognizable racial group" is the Court's language.

[20] "Venire" is the term used in civilian jurisdictions to describe a panel of people from which a jury is drawn. Hence, "veniremen" are members of that panel. Ballentine's Law Dictionary 1335 (3d ed. 1969).

[21] A "petit jury" is simply a trial jury. Ballentine's Law Dictionary 945 (3d ed. 1969).

[22] 476 U.S. at 87.

[23] *Id.* at 97-98.

[24] *Id.* at 103.

[25] *Id.* at 108.

[26] *Id.* at 112.

[27] Justice Burger quotes part of a dissenting opinion in New Jersey v. T.L.O., 468 U.S. 1214, 1215 (1984): "The single question presented to the court has now been briefed and argued. Evidently unable or unwilling to decide the question presented by the parties, the court, instead of dismissing the writ of certiorari as improvidently granted, orders reargument directed to the questions that [petitioner] decided not to bring here.... Volunteering unwanted advice is rarely a wise course of action." 476 U.S. at 115 n.2.

[28] 476 U.S. at 125.

[29] *Id.* at 127.

[30] 476 U.S. at 127 (citing United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984)).

[31] 476 U.S. at 126 n.7.

concerns that the Court's holding would likely interject racial matters back into the jury selection process.

While demonstrating a diversity of views concerning the value of the peremptory challenge, *Batson* became the law of the land. Not long afterwards, military practice felt its direct effects.

Application to the Military

In *United States v. Moore*[32] the Army Court of Military Review, sitting *en banc*, held that the *Batson* decision applied to the military. Applying the principles of *Batson* to courts-martial, the court noted that the elimination of racially discriminatory challenges is "consistent with and necessary to the proper administration of military justice."[33] It pointed out that under article 25 of the Uniform Code of Military Justice, the convening authority selects panel members on the basis of age, education, training, experience, length of service, and judicial temperament. Race is not a criterion for selection, nor is it a proper basis for exclusion. "Discrimination on the basis of race is abhorrent. It is particularly pernicious in the administration of justice. Accordingly, there is no logic in permitting the prosecutor, through the use of his peremptory challenge, to do what the convening authority, in the selection of panel members, may not."[34]

The court noted some significant differences between civilian and military practice. One is the number of peremptory challenges allowed each side. In most civilian jurisdictions, both the prosecution and the defense are allowed several peremptories, "sufficient that one party or the other can pervert constitutional norms by purposefully excluding a segment of society from participation in the administration of justice."[35] In a court-martial, however, each side has only one peremptory challenge.[36] Thus, counsel are likely to use their one peremptory challenge to preserve or enforce a challenge for cause,[37] or to remove a member who counsel believes may be sympathetic to the other side. Because each side has only one peremptory challenge, it would be nearly impossible for the accused to make out a prima facie case of racial discrimination as required by *Batson*. As a result, the Army court fashioned its own rule to satisfy the mandates of *Batson*. Under this per se rule, the accused need only state an objection to the trial counsel's peremptory challenge. Upon objection, the trial counsel must state his reason(s) for the challenge, which must be racially neutral. The military judge must then rule on the objection and make findings of fact. If the trial counsel fails to give a racially-neutral explanation, the peremptory challenge will not be granted, and counsel will be permitted to challenge another member.

The court applied its new procedure to Moore's case, in which the trial counsel peremptorily challenged a black panel member in the trial of a black soldier. It ordered the trial counsel to provide an affidavit stating his reasons for the challenge. Upon consideration of the affidavit, the court held that counsel provided a racially neutral explanation for the challenge.[38]

The Court of Military Appeals adopted the per se rule for all the services when it reviewed the Army court's holding in *Moore*.[39] The court found, however, that the affidavit provided by the trial counsel did not sufficiently explain the reasons for his challenge. It remanded the case for a *DuBay* hearing[40] to obtain the trial counsel's explanation.

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[32]26 M.J. 692 (A.C.M.R. 1988).

[33]*Id.* at 698.

[34]*Id.*

[35]*Id.* at 699.

[36]There is an exception to this general rule. Occasionally, successful challenges for cause (sometimes coupled with peremptory challenges) will reduce the court-martial's membership below the statutory quorum: five members for a general court-martial and three for a special court-martial. UCMJ art. 16. The convening authority must then detail additional members to the panel. In United States v. Carter, 25 M.J. 471 (C.M.A. 1988), the court held that when the convening authority adds new members to the court-martial panel, the military judge has the discretion to grant the accused an additional peremptory challenge. Indeed, the judge has a *duty* to grant additional peremptories if he determines that it is necessary to assure a fair trial.

[37]26 M.J. at 699 (citing United States v. Smart, 21 M.J. 15 (C.M.A. 1985), and R.C.M. 912 (f)(4)).

[38]Although the opinion of the court did not provide counsel's explanation, Senior Judge Adamkewicz revealed the affidavit's contents in his opinion, in which he concurred in part and dissented in part. The trial counsel challenged the member because he had previous dealings with him on military justice matters. Counsel stated that the member "responded with quizzical looks to several of the standard questions posed by the military judge during voir dire." Counsel said that he challenged the member "since the case ... involved numerous charges and several complicated issues [and] the government desired a panel that was least likely to be confused by the complexities of the trial." 26 M.J. 692, 709 (Adamkewicz, J., concurring in part, dissenting in part).

[39]28 M.J. 366 (C.M.A. 1989). The per se rule is prospective only.

> The military is not alone in dispensing with the *Batson* requirement that the defendant must first make a prima facie showing of race-based prosecutorial peremptories. The Supreme Court of Connecticut recently decided that the defendant need only claim *Batson* error. The burden to rebut shifts to the prosecutor.

Id. at 368 n.5 (citations omitted).

[40]United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967).

Shortly after the Army court decided *Moore*, the Court of Military Appeals decided *United States v. Santiago-Davila*.[41] It held that *Batson* applied to the military. In that Army case, the government peremptorily challenged one of the two Hispanic panel members. The accused was Puerto Rican. The defense asked the military judge to inquire into the trial counsel's challenge to determine, for the record, if counsel had challenged the member because of his race. The defense relied upon *People v. Wheeler*,[42] which affirmed a defendant's right under the California Constitution to a jury drawn from a representative cross section of society. The military judge noted that this right does not apply to courts-martial.[43] He did not have the benefit of *Batson*, however, because at the time of Santiago-Davila's trial, *Batson* had not yet been decided. The judge declined to inquire, relying on the Manual provision that stated that no reason need be given for the exercise of a peremptory challenge.[44] The trial counsel, who had previously offered to provide a reason for his challenge if required, then chose not to do so.

The court noted that *Batson* was not based on a right to be tried by a jury composed of a representative cross section of society. Instead, it was based on an equal protection right to be tried by a jury from which no "cognizable racial group" has been excluded. This right is part of due process under the fifth amendment; thus, "it applies to courts-martial, just as it does to civilian juries."[45] Moreover, in the court's view, *Batson*'s principles should be followed in the administration of military justice. "In our American society, the Armed Services have been a leader in eradicating racial discrimination. With this history in mind, we are sure that Congress never intended to condone the use of a government peremptory challenge for the purpose of excluding a 'cognizable racial group.'"[46]

Thus, application of *Batson* to the military was both constitutionally required and consistent with legislative intent. The court also recognized "Puerto Ricans" and Hispanics as "cognizable racial groups" for purposes of applying *Batson* to courts-martial.[47] The record did not clearly indicate that the trial counsel challenged the Hispanic court member for a reason other than his race. Accordingly, it ordered a *DuBay*[48] hearing to determine the prosecutor's reasons for exercising his peremptory challenge as he did.

This case raises the question: Why should *Batson* apply when at least one member of the accused's race actually sits on the panel? The answer is that *Batson* affirms the constitutional right not to be the victim of purposeful racial discrimination. Even if one member of the accused's race sits, there is no assurance that prior challenges were not racially-motivated. Because we have only one peremptory challenge per side in our court proceedings, racial discrimination is both harder to prove and harder to detect. The court stated in *Santiago-Davila*:

> Perhaps the showing of purposeful exclusion would have been stronger if the Government had been entitled to exercise two peremptory challenges and had used both to exclude the only two members with Hispanic surnames. However, we do not believe it decisive that a prosecutor runs out of his peremptory challenges before he can exclude all the members of a particular group.... The fact remains that appellant is a Puerto Rican and that the Government utilized its only peremptory challenge to excuse the only court member with an Hispanic surname who "grew up" in Puerto Rico.[49]

Remember that the accused is not the only one who suffers harm if a peremptory challenge is racially motivated. The excluded panel member does, too. He is also a victim of racial discrimination, for he is denied participation in jury service on account of his race.[50] Trial counsel should note Judge Cox's concurring opinion in *Santiago-Davila*. It advocates that trial counsel limit their use of the peremptory challenge to enforcing a challenge for cause. Judge Cox interpreted the Army court's *Moore* opinion as suggesting that trial counsel

> should give the convening authority credit for having wisely selected as members those who "are best qualified ... by reason of age, education, training, experience, length of service, and judicial temperament," Art. 25(d)(2), UCMJ, 10 U.S.C. § 825(d)(2), by not challenging members of the accused's race peremptorily unless there is good reason to do so.[51]

Judge Cox suggested that the government use its peremptory challenge sparingly, and even then, only when a

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[41] 26 M.J. 380 (C.M.A. 1988).

[42] 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

[43] 26 M.J. at 385. This observation was confirmed in a separate case decided later. *See* United States v. Hodge, 26 M.J. 596 (A.C.M.R. 1988).

[44] R.C.M. 912(g)(1).

[45] 26 M.J. at 390.

[46] *Id.*

[47] *Id.* at 391.

[48] 37 C.M.R. 411 (C.M.A. 1967).

[49] 26 M.J. at 391.

[50] *See Batson*, 476 U.S. at 87.

[51] 26 M.J. 380, 393 (Cox, J., concurring).

challenge for cause has not been granted. "If the grounds for the challenge for cause are on the record, *Batson v. Kentucky* ... will most likely be satisfied."[52]

This advice may be fine if counsel has *no* reason to challenge a member peremptorily. But it fails to account for the counsel who has a tactical reason to challenge that does not rise to the level of a challenge for cause. This approach places panel selection solely in the hands of the convening authority, without allowing trial counsel to "fine tune" the panel on behalf of the government. To rely solely on the convening authority to select a panel is to deprive the government of the best possible representation.

Although the government actually has an unlimited number of peremptory challenges when the convening authority selects a panel, the convening authority and the trial counsel have different goals and different criteria in their selection of members. The convening authority selects those who are "best qualified" based upon the criteria set forth in article 25, UCMJ. The trial counsel exercises peremptory challenges in order to obtain a panel most favorable to the government. Given the convening authority's selection of those who are "best qualified," one might think that there would be no need for the government to look further for suitable members, absent reasons for cause. However, the convening authority has a different view of the members than the lawyers do. He sees them in a different environment and a different light. In fact, in large general court-martial jurisdictions, he may not see them at all. For the most part, particularly in large jurisdictions, the convening authority selects members on the basis of a cursory review of their DA Forms 2A and 2-1. Except for perhaps the very senior colonels selected as members, the convening authority has no first-or even second-hand knowledge of the officer and enlisted members nominated and selected. Once he selects the members, the convening authority does not sit in the courtroom and observe the interplay between counsel and the members. He does not see the members from a lawyer's point of view.

For example, trial counsel may be entirely satisfied with Colonel Stone as a member for any case except those involving sex offenses. Colonel Stone is known to be hesitant to take tough disciplinary action against sex offenders in his own command. This fact will not support a challenge for cause. But it is also not the type of information that would be available to the convening authority when he selects Colonel Stone to sit as a court member on *all* cases for a designated period of time. Likewise, the convening authority is not likely to know that Sergeant First Class Jones's son has an alcohol problem. As far as the trial counsel is concerned, this fact makes Sergeant Jones a government "liability" in any case involving young soldiers accused of alcohol-related offenses.

These reasons and dozens more may not support challenges for cause. Nevertheless, they justify a peremptory challenge from the government's standpoint. Even if Colonel Stone is a member of the same "cognizable racial group" as the accused, this should not deter counsel from making his challenge if it will best meet the government's needs at trial.

The Racially Neutral Explanation

The per se rule predictably resolved the question of *when* a trial counsel would be required to explain his peremptory challenge. The next question became: what evidence will overcome the per se prima facie case? That is, what is a racially neutral explanation? A number of cases provide some guidance in this area.

Moore, following *Batson*, set the limits and guidelines. The reasons need not rise to the level justifying a challenge for cause. Nevertheless, the trial counsel may not "assume or intuit" that the member will be partial to an accused of the same race; nor may counsel merely deny bad faith or affirm his good faith in using his challenge as he did.[53]

In *United States v. St. Fort*[54] the trial counsel offered several reasons for exercising his peremptory challenge against the only black member of the court. They were: 1) CPT T was the most junior member of the court; 2) because CPT T was a female, she might have "undue empathy with [appellant's] wife" in this case involving attempted adultery; and 3) from trial counsel's prior experience with CPT T, he had found her to be "a little too sympathetic" towards those accused of crimes.[55]

The Army Court of Military Review focused upon the third reason for challenge and held that it was a racially neutral explanation. The court did not address the other reasons given. Judge Kane, writing for the court, noted: "While questions during *voir dire* may prompt a peremptory challenge, there is no requirement that a prosecutor's reason be supported by the record of *voir dire*."[56] Thus, extra-judicial contact or experience with a prospective panel member could provide a legitimate (i.e., neutral) basis for challenge.

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[52] *Id.*

[53] 28 M.J. at 368.

[54] 26 M.J. 764 (A.C.M.R. 1988).

[55] *Id.* at 765.

[56] *Id.* at 766.

In *United States v. Shelby*,[57] a case involving a black accused, the trial counsel challenged the sole remaining black member of the panel because the member "is an ensign and I want more senior people on the panel."[58] Both the military judge and the Navy-Marine Corps Court of Military Review interpreted his comment to mean that the prosecutor wanted the members with the most experience to sit on the panel. The challenged member had the least experience of all the panel members, including the enlisted members.

The Court of Military Review agreed with the military judge that the trial counsel had articulated a neutral, nondiscriminatory reason for exercising the challenge.[59] Thus, under *Shelby*, a member's comparative lack of experience would support a peremptory challenge in the *Batson* context. "Comparative" is the operative word, however. Counsel should establish the relative experience of each member on the record so that the experience of the challenged member can be compared with the others in the event that the propriety of the challenge is attacked at trial or on appeal.

Another explanation was tested in *United States v. Cooper*.[60] The trial counsel peremptorily challenged one of two black panel members. In what the Army court called "no model of clarity,"[61] the prosecution stated that he challenged the member because of her prior duty experience, current duty position, and information from her Officer Record Brief and DA Forms 2 and 2-1. The trial counsel also mentioned that he wanted to "bring the court down to a certain number."[62] While the member's race did not influence his decision, her sex "marginally" did. The trial counsel considered how her current duty position (company commander), past experience in the Army, and her worldly experience would affect her consideration of the evidence in the case. The Army Court of Military Review inferred from the prosecutor's explanation that he was concerned about certain actions taken by the member during her tenure as company commander.[63] It found no *Batson* violation. The court did note that the military judge committed a procedural error by failing to make formal findings of fact on the record. Nevertheless, the error was harmless.

Cooper suggests that *Batson* will be satisfied by a combination of duty factors no more specific than prior duty experience, current duty position, and review of DA Forms 2 and 2-1.

Two other cases address experience as well. In *United States v. Curtis*[64] the accused, a black Marine, was convicted of murder and sentenced to death. On appeal he raised the prosecutor's peremptory challenge of a black panel member. During voir dire, the member indicated that he saw participation as a juror on the case as a "learning experience." Counsel stated that this was not the kind of juror the government wanted on the case. The military judge sustained the challenge, finding that the prosecutor's explanation satisfied *Batson*.[65] The Navy-Marine Corps Court of Military Review agreed, noting that counsel's questioning during voir dire demonstrated that he wanted panel members who were aware of and who could carry out the serious responsibility of deciding a capital case. The trial counsel "sensed something less than these qualities in Staff Sergeant Edwards and felt that a case with the serious consequences of this one should not be used as a 'learning experience.'"[66]

The case of *United States v. Dawson*[67] points out the importance of using voir dire to develop a predicate for making a peremptory challenge. The trial counsel based his challenge of a member of the accused's race upon the second lieutenant's educational background, her junior status on the court-martial, and her lack of experience. The challenged member had seventeen months in a reserve unit. Voir dire revealed that she was the least acquainted with the Army drug testing program. One of the charges was wrongful use of marijuana. The prosecutor thus satisfied the requirement for a racially neutral explanation.

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[57] 26 M.J. 921 (N.M.C.M.R. 1988).

[58] *Id.* at 923.

[59] But the court disagreed with the military judge's finding that the accused had not made a prima facie case of purposeful discrimination. (The Navy did not follow a per se rule at the time.) Nevertheless, the judge did require that the trial counsel state the reasons for his challenge for the record. This avoided the extra time and effort which would have otherwise been required to ascertain the prosecutor's motives.

[60] 28 M.J. 810 (A.C.M.R. 1989).

[61] *Id.* at 812.

[62] *Id.*

[63] *Id.* at 815.

[64] 28 M.J. 1074 (N.M.C.M.R. 1989).

[65] The Navy did not have a per se rule until the Court of Military Appeals applied it to all of the services in United States v. Moore. Thus, the Navy court applied the *Batson* analysis to both *Curtis* and *Shelby*. The trial court in both cases had to decide whether the accused made a prima facie showing of discrimination.

[66] 28 M.J. at 1092.

[67] 29 M.J. 595 (A.C.M.R. 1989).

Finally, a case from the civilian world illustrates at least one state's view as to what constitutes a "racially neutral" explanation for the prosecution's use of peremptory challenges. In *Tompkins v. State*[68] the defendant, a black man, was convicted of capital murder and sentenced to death. The defendant claimed at trial and on appeal that the state illegally used its peremptory challenges to strike five black potential jurors because of their race. The Texas Court of Criminal Appeals upheld the peremptory challenges as racially neutral.

The two potential jurors were struck because of their general opposition to the death penalty. One of these two veniremembers also indicated that she might refuse to return a verdict unless the defendant testified at trial. Another potential juror indicated serious reservations about returning a guilty verdict based solely on circumstantial evidence. The fourth venireman was challenged because his reading and writing skills were poor and because the case was complicated and was expected to include detailed written jury instructions. The fifth black venireman caused the greatest concern for the court, because he was struck solely because he had been an employee of the United States Postal Service for thirteen years. The prosecutor noted that he had "not had very good luck with postal employees."[69] The prosecutor did state that the venireman was not challenged "simply because he was black."[70] The Court of Criminal Appeals deferred to the trial judge's findings of fact with respect to the fifth venireman (and each of the other challenged veniremembers) that the reason given for the peremptory challenge was racially neutral.

Except for the challenge to the fifth venireman, the reasons given for the peremptory challenges were related to some facet of the case, such as expected evidence, testimony, instructions, or possible sentence, although the death sentence was imposed by the trial judge. This case suggests that, where the explanations of the prosecutor tend to demonstrate the relevance of the challenge to the facts or some other aspect of the case, they are more likely to be deemed racially neutral.

Practice Pointers

The foregoing cases are instructive in several ways. First, they give counsel an idea as to what constitutes a "neutral explanation." Second, taken as a whole, the military cases suggest that a neutral explanation tends to focus more on a prospective member's experience or "track record" (as commander, for example) rather than on other criteria such as the member's sex or rank. Third, they provide guidance for the trial counsel as to how to prepare for and conduct voir dire where there is any possibility that a *Batson* issue might arise. The following should be useful for the trial counsel:

1. Don't be afraid to use the peremptory challenge when the circumstances call for it. This includes using the peremptory when a challenge for cause has not been granted. On the other hand, if there is no reason to use the peremptory challenge, don't. Do not create an unnecessary issue.

2. In most cases, if the trial counsel must challenge, he should know who he intends to challenge before he gets to court. This means that he must prepare. He must know the panel members and their track records.[71] He must study the questionnaires submitted by the members pursuant to R.C.M. 912(b)(1). He must know why he wants to challenge. He must prepare to demonstrate and articulate his reasons. His preparation may uncover grounds for a challenge for cause.

3. Set up the peremptory challenge in voir dire, as if building a challenge for cause. Ask questions that will elicit the information upon which the challenge will be based. For example, in *Dawson*, the prosecutor used voir dire to ascertain the members' comparative experience with the Army drug testing program. If the challenge is based upon a comparison between members, ask all of the members the same question so that a comparison can be made. If the challenge is based upon prior contact with the challenged member, voir dire the member to establish the existence and general nature of that contact.

4. Obviously, counsel must state his reasons clearly.[72] These reasons must be racially neutral. Counsel should be specific enough to allow the military judge to make an informed ruling.

5. Give several reasons for the challenge, as counsel did in *St. Fort*, *Cooper*, and *Dawson*.

6. If possible, give reasons that demonstrate the relevance of the challenge to the facts of the case or the witnesses to be called.

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[68] 774 S.W.2d 195 (Tex. Crim. App. 1987).

[69] *Id.* at 205.

[70] *Id.*

[71] This can be done by talking to trial counsel who have worked with the member, or have tried cases in front of him.

[72] *See* United States v. Cooper, 28 M.J. 810 (A.C.M.R. 1989).

7. Ensure that the military judge makes specific findings of fact on the record. The judge should state whether counsel has articulated racially neutral reasons for the challenge.

8. Finally, as a matter of diplomacy, counsel must be mindful of how to explain the challenge. Many prosecutors work in small communities where they frequently come into contact with the very soldiers who end up sitting on their panels. After the trial is over, they will continue to work with these same soldiers. Counsel cannot expect to explain openly today that "Colonel Smith is dumber than a rock" (and should not sit) and walk into Colonel Smith's office tomorrow seeking assistance with another matter. Counsel should not only choose their words with care, they should, for the sake of all concerned, limit their audience to the military judge, opposing counsel, the accused, and the court reporter. In short, if possible, they should give their explanation at side bar, as suggested by the Army Court of Military Review in *Moore*.[73]

Batson and the Defense

Now that *Batson* has limited the government's use of the peremptory challenge, can a limitation on defense use be far behind? Chief Justice Burger, dissenting in *Batson*, thought not.[74] The movement has already started, but its success remains to be seen. In *People v. Kern* the Appellate Division of the New York Supreme Court held that the *Batson* rule also applied to the defense.[75] This ruling came out of an appeal arising from the "Howard Beach" incident, in which a group of white teenagers killed a black man and severely injured another. At trial, the defense used its peremptory challenges to strike several black jurors. The judge held that *Batson* applied to the defense. Accordingly, he required the defense to provide racially neutral reasons for the exercise of its remaining peremptories against black jurors. The defense failed to give an acceptable reason for one black juror, who was seated, but later excused due to an illness in the family. An all-white jury convicted the defendant. The Appellate Court addressed the defendant's "reverse-Batson" complaint, even though it was rendered moot by the selection of the all-white jury.

The appellant made essentially two arguments. First, he argued that *Batson* cannot apply to the defense because there is no state action when a defendant exercises his peremptory challenges to strike a juror. Second, he argued that the state has no standing to raise *Batson* violations, because it is not a member of a "cognizable racial group" sought to be excluded from the jury by the defense exercise of its peremptory challenges.

The court responded that the state is intimately involved in the jury selection process. The court clerk summons the jurors to appear for jury duty, and the judge supervises counsel's questioning of the jurors and dismisses those against whom a challenge has been sustained. "The State, by means of the exercise of real and apparent judicial authority in excusing the challenged juror, directly effects the defendant's discriminatory act ..."[76] Thus, the "private conduct" of the defense is attributable to the state.

Contrary to the second defense argument, the court found that the state has standing in *Batson*-type circumstances under the principles of third-party standing. In short, the state has a direct interest in protecting its citizens, and it is unlikely that anyone other than the state would assert the rights of the excluded jurors and the community at large.[77]

The New York court is not the first to prohibit discriminatory use of the peremptory challenge by the defense. Prior to *Batson*, at least three state supreme courts recognized the prohibition on discriminatory use by either side. This prohibition was grounded in their state constitutions.[78] It is not likely that the New York court will be the last to take a "reverse-*Batson*" stand. At the very least, traditional notions of fair play will cause some courts to apply "reverse-*Batson*." That is, what is fair for the defense should be fair for the prosecution.

Despite some courts' inclination to apply *Batson* to the defense, the Supreme Court continues to demonstrate its reluctance to extend *Batson* that far. It displayed this reluctance fairly recently in *Alabama v. Cox*.[79]

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[73] 26 M.J. at 701 n.10.

[74] 476 U.S. 79, 127.

[75] 45 Crim. L. Rep. (BNA) 2354 (N.Y. App. Div. 1989).

[76] *Id.* at 2354.

[77] *Id.*

[78] California (People v. Wheeler, 583 P.2d 748); Massachusetts (Commonwealth v. Soares, 387 N.E.2d 499); and Florida (State v. Neil, 457 So. 2d 481) are three jurisdictions that prohibit discriminatory use of the peremptory by the defense. Given this prohibition, it is not surprising that Florida's Third District Court of Appeals recently upheld a trial judge's application of reverse-*Batson* in the trial of a Miami policeman who shot and killed a black motorcyclist. The story was reported in The Washington Post, Nov. 14, 1989.

[79] 531 So. 2d 71 (Ala. Crim. App. 1988), *cert. denied*, 109 S. Ct. 817 (1989).

In *Cox*, two members of the Ku Klux Klan were to be tried for the brutal murder of a young black man. Prior to trial, the state filed a motion to prohibit the defense from exercising its peremptory challenges to remove blacks from the jury solely because of their race. A hearing was held on the motion, and the trial court deferred its ruling until trial. At trial, the defendants combined their peremptory challenges to exclude all sixteen black veniremembers from the jury. The state then renewed its motion, requesting that the defense be required to make a showing as to why it removed all of the blacks from the jury. The court denied the motion, "based on its 'understanding that *Batson* does not apply to defense counsel.'"[80] The case went to trial before an all-white jury, but a mistrial was declared later because one of the defendants appeared to become ill. A retrial was scheduled.

Pending retrial, the state again sought application of *Batson* to the defense. The trial court again denied the state's motion, whereupon the state petitioned in turn the Alabama Court of Criminal Appeals and the Alabama Supreme Court. Both courts denied the state's petitions. The state then petitioned the United States Supreme Court for a writ of certiorari, inviting the Court to decide: 1) whether the equal protection clause prohibits white defendants charged with murdering a black person from using a state system of peremptory challenges to exclude black veniremembers from the jury solely because of their race; and 2) whether *Batson* should be extended to the use of peremptory challenges by defense counsel representing white defendants charged with crimes against black victims.[81]

At least three amicus curiae briefs were filed in the case. Notably, one of these briefs was filed by the Attorney General of the State of Missouri. He was joined by the attorneys general of forty-four other states.

Despite this, the Supreme Court declined to accept the invitation to address the questions posed by the State of Alabama, leaving *Batson*'s limited application to the prosecution intact. The Court's decision should offer some encouragement to the proponents of the peremptory challenge. It would appear that, at least for now, the peremptory challenge has been spared further erosion of its once-solid foundation.

Whether "reverse-*Batson*" will ever be applied to the military remains to be seen. It is probably safe to say that the military courts will not apply "reverse-*Batson*" as long as the Supreme Court refuses to apply it. In the meantime, counsel can view "reverse-*Batson*" developments as a matter of academic interest, while they perfect their skills in conducting voir dire.

Conclusion

Do *Batson* and its military progeny spell the beginning of the end of the peremptory challenge? Is the peremptory challenge now more trouble than it is worth?

Because of *Batson*, those who currently try court-martial cases must keep in mind the one limitation on their use of the peremptory challenge. But it is a limitation that is triggered only by a very specific set of circumstances. Absent those circumstances, there is no *Batson* issue and no restriction on the peremptory's use. Thus, while *Batson* has diminished the impact of the peremptory challenge on courts-martial, it is a long way from having struck a fatal blow. Even if a "reverse-*Batson*" rule is eventually applied to the defense, the peremptory challenge is not likely to crumble. Its complete collapse is much more likely to occur if *Batson* is ever expanded to include inquiry into challenges to members on the basis of classifications other than race.

Although there are several,[82] religion and gender are two such classifications. In the court-martial context, what if the accused is a member of the Jewish faith and the prosecutor peremptorily challenges the one member on the panel who is also a member of the Jewish faith? What about a female accused who is tried by a panel from which a female member is excluded? Going a step further, how about the old defense tactic of challenging women off the panel in a rape case? Or challenging Baptists off the panel in cases involving alcohol-related offenses, such as drunk driving?

Expanding the *Batson* rule to any of these scenarios would further erode the peremptory challenge, while inviting inquiry into challenges based on still other classifications of individuals. The cumulative effect of these erosions would be the eventual collapse of the peremptory challenge. It would cease to be peremptory challenge and become a challenge for cause.

In the meantime, however, the peremptory challenge is not in danger; nor is it more trouble than it's worth. Even with the decisions in *Batson* and *Santiago-Davila*, it remains a very effective, useful tool, if it is used thoughtfully and properly. Effective use of the peremptory challenge calls for adequate preparation, as well as a thorough knowledge of both the law and the facts of the case.

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[80]Brief for Petitioner at 9, Alabama v. Cox, 109 S. Ct. 817 (1989) (No. 88-630).

[81]Brief for Petitioner-Issues Presented, Alabama v. Cox, 109 S. Ct. 817 (1989) (No. 88-630).

[82]In his dissent in *Batson*, Chief Justice Burger listed several classifications that are subject to conventional equal protection principles. In addition to race, these classifications are sex, age, religious or political affiliation, mental capacity, number of children, living arrangements, and employment in a particular industry or profession. The Chief Justice noted that the majority in *Batson* did not apply the conventional equal protection principles to the facts before it. If such principles do apply, then presumably defendants could object to exclusions on the basis of not only race, but also on the basis of these other classifications. *See Batson* 476 U.S. 79, 124 (Burger, C.J., dissenting).

Is R.C.M. 1001(b)(5) Dead? An Analysis of *Horner/Ohrt*

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Introduction

A trial counsel is not really victorious at trial until an appropriate sentence is adjudged. A conviction is only a means to the end. The desired end, in most cases, is a sentence to confinement and a punitive discharge. To achieve the desired end, trial counsel must marshal all available evidence in aggravation to convince the military judge or court members that a sentence to confinement and a punitive discharge is deserved by the accused. If the crime by itself does not warrant this (and even if it does), the trial counsel must convince the sentencing authority that the accused possesses no potential for further military service.

To achieve this, the accused's company commander will usually be the best witness for the government.[1] In most cases, company commanders are willing to state that they do not want the convicted soldiers back in their units. Indeed, because the company commander was probably the first in the chain of command to recommend court-martial, the commander will usually be more than willing to make this statement, regardless of whether he or she believes the accused possesses any rehabilitative potential in the short or long run.[2]

The Court of Military Appeals has held that in calling the company commander to testify in this regard, trial counsel may have, unwittingly, invaded the province of the court-martial in the performance of its sentencing duties. *United States v. Horner*[3] and its progeny, *United States v. Ohrt*,[4] both alert trial counsel to this potential appellate issue and guide trial counsel in their introduction of such important sentencing evidence.

United States v. Horner may have ended the use of the company commander in this manner. As a result, trial counsel may have to look for witnesses other than the commander to provide this testimony.

Query: Does *Horner* and its progeny, *United States v. Ohrt*,[5] really restrict trial counsel use of certain evidence under R.C.M. 1001(b)(5)?[6] This article will examine this question and provide a roadmap for trial counsel to follow in order to avoid potential problems in the use of R.C.M. 1001(b)(5) evidence. *Horner*, *Ohrt*, and certain decisions of the various courts of military review will be examined. The following questions will be addressed regarding R.C.M. 1001(b)(5) evidence of rehabilitation potential: 1) Who is an appropriate witness?; 2) Does a foundation need to be laid?; 3) How is that foundation laid?; 4) Can specific acts of misconduct be presented in establishing a foundation?; 5) What is a proper scope of the witness's opinion?; and 6) What question should be asked by trial counsel in order to elicit a proper response?

Who Is an Appropriate Witness?

Anyone may be a R.C.M. 1001(b)(5) witness, as long as he or she has a "rationally based" opinion of the accused's potential for rehabilitation.[7] A "rationally based" opinion refers to the accused and is based on the accused's character and potential.[8]

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[1] The company commander is a powerful weapon in the trial counsel's arsenal. A panel, more so than the military judge, wants to hear the commander's assessment of the accused's potential for further productive military service. *See* United States v. Randolph, 20 M.J. 850, 852 (A.C.M.R. 1985) (Pauley, J., concurring and dissenting in part) ("[T]here is no more persuasive evidence available to a military tribunal than the testimony of the accused's immediate commanding officer").

[2] From the commander's perspective, rehabilitation is only one of several considerations in punishing offenders. Having the accused back in the unit after being convicted of committing a serious crime is not likely to serve any punishment goal.

[3] 22 M.J. 294 (C.M.A. 1986).

[4] 28 M.J. 301 (C.M.A. 1989). In *Ohrt* the Court of Military Appeals has interpreted statements such as "no potential for continued service" or "he should be discharged" as euphemisms designed to direct the court to "give the accused a punitive discharge." *Id.* at 304. It is more likely, however, that the commander who is providing such testimony is just being sincere — that is, the commander wants the court to adjudge an appropriate sentence for the crime committed. If no discharged is adjudged, the commander does not want the accused back in the unit under any circumstances.

[5] 28 M.J. 301 (C.M.A. 1989).

[6] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(b)(5) [hereinafter MCM, 1984, and R.C.M. 1001(b)(5), respectively].

[7] *Ohrt*, 28 M.J. 304 (the witness must possess a rationally based opinion for his conclusions regarding the accused's character); United States v. Gunter, 29 M.J. 140, 141 (C.M.A. 1989) (only a witness who has a rational basis for his conclusion may express an opinion).

[8] *Ohrt*, 28 M.J. at 304.

> Thus, a foundation must be laid to demonstrate that the witness does possess sufficient information and knowledge about the accused—his character, his performance of duty as a servicemember, his moral fiber, and his determination to be rehabilitated—to give a "rationally based" opinion. Of course, as in all cases, this requirement can be waived or agreed upon by the opposing party.

Id. See also United States v. Antonitis, 29 M.J. 217, 220 (C.M.A. 1989).

The accused's company commander may testify as to the accused's potential for rehabilitation. Certain language in *Ohrt*[9] has been interpreted by the Coast Guard Court of Military Review to prohibit this use of the commander. As a result, that court has adopted a per se rule against calling the accused's commander as an R.C.M. 1001(b)(5) witness on direct examination.[10] In reading *Ohrt* in its entirety[11] and in view of subsequent decisions handed down by both the Court of Military Appeals and the lower courts of review, it is evident that the Coast Guard court misinterpreted the intention of the Court of Military Appeals.[12] The court's reference to "commander" was an illustration of trial counsel's improper use of this *often called* witness; it was not intended as a universal condemnation of using the commander under R.C.M. 1001(b)(5).[13] *Ohrt* stands for the proposition that it is improper for the trial counsel to call a witness, whether or not the witness is the accused's company commander, solely for the purpose of telling the court to punitively discharge the accused. Any witness, even the accused's commander, who gives an opinion based on the accused's true potential for rehabilitation and who possesses adequate knowledge of the accused is a proper witness, whether he or she is called on direct or in rebuttal.

A drug and alcohol counselor may also be called to give an opinion. In substance abuse cases, this witness is perhaps more valuable to the government than the accused's commander. The Court of Military Appeals, in *United States v. Gunter*,[14] sanctioned calling this witness as long as it does not violate applicable service regulations.[15] Paragraph 5-5d of Air Force Regulation 111-1, Military Justice Guide (1984), allows the drug and alcohol counselor to testify on rebuttal concerning the accused's lack of rehabilitative potential.[16] The Army Alcohol and Drug Abuse Prevention and Control Program[17] (ADAPCP) sets forth Army policy on disclosure of information developed within this program. AR 600-85 does not prohibit the government, during sentencing, from calling the accused's drug and alcohol counselor to provide an opinion on the accused's rehabilitative potential in its case-in-chief, as long as the

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[9] *Ohrt*, 28 M.J. at 301.

> [I]t is clear that some prosecutors view this rule [R.C.M. 1001(b)(5)] as a license to bring a commanding officer before a court-martial preemptively *to influence* the court members into returning a particular sentence. It is most apparent that trial counsel are urging adjudication of a punitive discharge. *Such witnesses have no place in court-martial proceedings.*

Id. at 303 (emphasis added).

[10] United States v. Claxton, 29 M.J. 667 (C.G.C.M.R. 1989), reconsidered, 29 M.J. 1032 (C.G.C.M.R. 1990).

> [N]otwithstanding the apparent authority of R.C.M. 1001(b)(5), the government may not call an accused's commanding officer at the sentencing stage of trial to testify that an accused lacks rehabilitative potential, unless it is in rebuttal to matters presented by the defense.... U.S. v. Ohrt, *supra*, makes it clear that testimony from a commanding officer that an accused does not have rehabilitative potential equates to expressing an opinion that the accused should be separated from the service with a punitive discharge, the only kind of discharge that a court-martial may impose.

Id. at 668. Note, this dicta is absent from the C.G.C.M.R.'s reconsidered opinion.

[11] *Ohrt*, 28 M.J. at 301 (the court found error, not because of the witness's status as the accused's squadron commander, but because in reading the entire testimony of this witness, it could not conclude with certainty that the witness's opinion was based on more than the offense committed).

[12] *Id.* at 304-05. The Court of Military Appeals used this language solely to manifest its disapproval of trial counsel's *intention* in calling this witness, i.e., solely to tell the court to give the accused a punitive discharge. The court recognized that trial counsel call commanders, not with the intention of having them impart to the court-martial the accused's true character for rehabilitation, but rather to tell the court to discharge the accused. Only the court-martial can decide the sentence. To allow the witness to tell the court to "give the accused a punitive discharge" invades this special province of the court.

[13] The company commander may be a valuable source of evidence concerning the accused's character for rehabilitation. In many instances, the commander is involved in: 1) counselling; 2) attempts at rehabilitation; and 3) rating soldiers within his command. To eliminate such a witness based solely on the witness's status would be legal overkill. *See Horner*, 22 M.J. at 296 ("Indeed, given the highly structured system of supervision and evaluation employed universally in the armed forces, it seems likely that accurate and useful judgments of servicemembers' rehabilitative potential can frequently be formed.").

The commanders were called as R.C.M. 1001(b)(5) witnesses in many cases. In many of these same cases the sentence was set aside on appeal, but for reasons other than the witness's status. *See Ohrt*, 28 M.J. 301; United States v. Antonitis, 29 M.J. 217 (C.M.A. 1989); United States v. Beno, 24 M.J. 771 (A.F.C.M.R. 1987), *pet. denied*, 26 M.J. 57 (C.M.A. 1988) (cited in *Ohrt*, 28 M.J. 303); United States v. Murphy, 29 M.J. 573 (A.F.C.M.R. 1989); United States v. Clarke, 29 M.J. 582 (A.F.C.M.R. 1989); United States v. Haynes, 29 M.J. 610 (A.C.M.R. 1989). *Cf.* United States v. Gunter, 29 M.J. 140, 141 (C.M.A. 1989) (citing Judge Sullivan's dissent in *Ohrt*, 28 M.J. at 307-09, wherein Judge Sullivan found that the commander's review of the accused's personnel file and his stated assurance that his opinion was based on more than the offense committed by the accused established a sufficient foundation).

[14] 29 M.J. 140 (C.M.A. 1989).

[15] *Id.* at 142.

[16] *Id.*

[17] Army Reg. 600-85, Personnel-General: Alcohol and Drug Abuse Prevention and Control Program, paras. 6-3 through 6-10 (21 Oct. 1988) [hereinafter AR 600-85].

accused was command-referred to ADAPCP.[18] Also, if the accused presents any evidence tending to show that he has rehabilitative potential, trial counsel can call this witness on rebuttal.[19] Trial counsel should attempt to qualify this witness as an expert. In so doing, even if this witness has never talked to the accused, the witness can base the opinion solely on the accused's drug rehabilitation files.[20]

Does a Foundation Need to Be Laid and, If So, What Type of Foundation?

A foundation must be laid before a witness can give his or her opinion, but "this requirement can be waived or agreed upon by the opposing party."[21] It is a prudent practice for trial counsel to lay an appropriate foundation, because if it is not established, it leaves the government's case vulnerable to latent objections by trial defense counsel and attack on appeal. Also, it may become evident after the witness has finished testifying that the opinion was not based on the accused's potential for rehabilitation, but was based solely on the witness's view of the offense. In *Ohrt*[22] trial counsel asked the squadron commander to give his opinion of the accused's potential for rehabilitation. The commander stated, "I believe he [accused] does not have potential." On cross-examination, he was asked whether his opinion was based solely on the use of marijuana, the offense of which the accused had just been convicted. The commander responded, "and previous alcohol abuse." Dissenting in part from the opinion expressed by his colleagues, Judge Sullivan found that a sufficient foundation had been laid for this witness's opinion.[23] Judge Cox, writing the opinion of the court, found the foundation to be inadequate. Who is right? It is apparent that Judge Sullivan based his opinion on the fact that the witness gave all the right answers to the foundational questions. Judge Cox, however, writing for the majority, noted that when asked a non-foundational question by a panel member—"[W]as Sergeant Ohrt offered Article 15 punishment?"—the commander testified that it was his opinion that anyone "involved with the use of drugs and found to be guilty that I would have no more use for [his] services in my command."[24] This response effectively negated the commander's previous statement that his opinion was based on more than the accused's use of marijuana.[25]

Where Should the Foundation Be Established?

In most instances, it is preferable to lay the foundation outside the presence of the members[26] to avoid running afoul of the R.C.M. 1001(b)(5) prohibition against inquiry into specific instances of conduct on direct examination.[27] The foundation can be laid either in an article 39(a), UCMJ,[28] session or by an offer of proof under Mil. R. Evid. 103.[29] The benefit of using an article 39(a) session to lay a foundation is that technical evidentiary rules

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[18] *See* United States v. Johnson, 25 M.J. 517 (A.C.M.R. 1988) (the court found no error where the trial counsel called the accused's commander as a witness during the government's case-in-chief on sentencing and the latter testified that the accused had been command-referred to ADAPCP and subsequently failed rehabilitation because he did not make the scheduled appointments. The court held that the challenged testimony was neither privileged nor within the evidentiary prohibitions of the "Limited Use Policy" of AR 600-85). *But see* United States v. Howes, 22 M.J. 704 (A.C.M.R. 1986) (the court found the accused's defense counsel ineffective because he failed to object when trial counsel introduced evidence on rebuttal of the accused's enrollment in ADAPCP). *Howes* is of questionable validity. The *Johnson* court distinguished its holding from *Howes* by stating that *Howes* was based on an earlier version of AR 600-85 that prescribed the Army's exemption policy. *Johnson*, 25 M.J. at 519.

[19] AR 600-85, para. 6-4e (1).

[20] *Gunter*, 29 M.J. at 141.

[21] *Ohrt*, 29 M.J. at 304.

[22] *Id.* at 301.

[23] *Id.* at 307-09. The commander testified that he had reviewed the accused's squadron information files prior to coming to court and that his opinion was based on the accused's use of marijuana and his alcohol abuse. From this, Judge Sullivan correctly determined that a sufficient foundation had been established. *Id.* at 303 (citing *Beno*, 24 M.J. at 771). In *Beno* the commander of a large organization testified as to the accused's potential for rehabilitation. It is apparent from the facts that the commander had no personal knowledge of the accused, but had become familiar with him through a review of his squadron personnel file and through a conversation with the accused's first sergeant. Based on the extent of the appellant's known drug use, he testified that the accused was likely to continue this activity in the future and, therefore, he doubted that the appellant had any rehabilitative potential "if and when he enters back into civilian society." *Beno*, 24 M.J. at 772. The Air Force Court of Military Review found that the commander "barely knew the appellant, if he knew him at all" and that the opinion was based on something more, if very little more, than the nature of the offenses. The court reluctantly held that it was sufficient foundation under *Horner*. *Beno*, 24 M.J. at 772.

[24] *Ohrt*, 28 M.J. at 307.

[25] Presumably, Judge Cox would have found a sufficient basis for this commander's opinion had this exchange between the court member and the commander never occurred. *Id.* at 303 (citing *Beno*, 24 M.J. at 771). *See also Gunter*, 29 M.J. at 141 (citing *Ohrt*, 28 M.J. at 347-09 (Sullivan, J., dissenting)).

[26] *Ohrt*, 29 M.J. at 307 n.6.

[27] R.C.M. 1001(b)(5) provides:

> Evidence of rehabilitative potential. The trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence, in the form of opinions concerning the accused's previous performance as a servicemember and potential for rehabilitation. On cross-examination, inquiry is allowable into relevant and specific instances of conduct.

[28] Uniform Code of Military Justice art. 39(a), 10 U.S.C. § 839 (1982) [hereinafter UCMJ].

[29] MCM, 1984, Mil. R. Evid. 103 [hereinafter Mil. R. Evid. 103].

do not apply to foundational questions,[30] thereby allowing the trial counsel to introduce, for this limited purpose, a vast array of evidence, such as hearsay[31] or extrinsic evidence.[32] Once the foundation is laid, the witness is free to give his or her opinion before the members, subject only to cross-examination by trial defense counsel.

Trial counsel may lay the foundation before the sentencing authority, although counsel must scrupulously avoid inquiry into specific acts of uncharged misconduct (except on cross-examination) so as to not violate R.C.M. 1001(b)(5).[33] Also, trial counsel cannot introduce extrinsic evidence of uncharged misconduct, unless it is relevant and admissible under another provision of R.C.M. 1001(b). At times, trial counsel will have sufficient evidence admitted on other grounds to establish a foundation based on the previously admitted evidence. It is permissible for trial counsel to use *previously admitted* uncharged misconduct to lay the foundation before the sentencing authority.[34]

What is an Appropriate Foundation?

Trial counsel must establish the following two essential elements of foundation: 1) that the witness has personal knowledge of the accused;[35] and 2) that the witness's opinion has a rational basis.[36]

Trial counsel should find witnesses who have had close relationships with the accused. At a minimum, trial counsel should ensure that the witness has thoroughly reviewed the accused's personnel file.[37] Personal contact is not essential, but without it, trial counsel may not convince the military judge that a sufficient foundation had

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[30] Mil. R. Evid. 104 provides:

> (a) *Questions* of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness ... shall be determined by the military judge. In making these determinations the military judge is not bound by the rules of evidence except those with respect to privileges.

[31] United States v. Brown, 28 M.J. 470, 474 (C.M.A. 1989) ("A proffer of such proof for this limited purpose [laying a foundation] might avoid the prohibition against hearsay provided in Mil. R. Evid. 802").

[32] United States v. Wingart, 27 M.J. 128 (C.M.A. 1988) (use of extrinsic evidence is prohibited, on either direct or cross-examination, to prove specific acts of uncharged misconduct).

[33] United States v. Susee, 25 M.J. 538, 540 (A.C.M.R. 1987) ("*A fortiori*, parties proffering evidence in the nature of an opinion must be afforded a full and fair opportunity to lay the requisite foundation as long as inquiry into specific instances of conduct is not permitted on direct examination").

[34] *Id.* at 538. In *Susee* the trial counsel established before the members a foundation for the accused's first sergeant's opinion. The first sergeant, in explaining why he felt the accused did not have rehabilitative potential, referred to an earlier, uncharged absence without leave (AWOL). Trial defense counsel objected, stating that trial counsel was prohibited from engaging in an "inquiry into specific acts of conduct" on direct examination. The military judge overruled the objection and admitted the testimony. The Army Court of Military Review found that the reference to the earlier AWOL was not an "inquiry into specific acts," but was merely a point of reference from which the first sergeant began his testimony. The court also found that, even if it was error, it was harmless error because evidence of the earlier AWOL had already been admitted into evidence as matters in aggravation. *But see Clarke*, 29 M.J. at 582. In *Clarke* trial counsel established a foundation before the members for the opinion of the accused's squadron commander by asking him whether he had ever initiated administrative discharge proceedings against the accused. The commander said that he had. When he was asked by trial counsel for the basis of that action, the commander stated "minor misconduct." Defense counsel objected but was overruled by the military judge. The Air Force Court of Military Review, although noting that certain minor acts of misconduct were already properly before the court upon another basis, found error in that the members were made aware of specific wrongdoing (i.e., "minor misconduct"), which the court stated is impermissible under R.C.M. 1001(b)(5), "unless and until the defense opens the door." *Clarke*, 29 M.J. at 585. There is a distinction that can be drawn between *Susee* and *Clarke*. In *Susee* the AWOL referred to by the witness was the same AWOL introduced previously by the trial counsel; in *Clarke* it *appears* that there was no relationship between the minor misconduct previously admitted into evidence and that referred to by the squadron commander.

[35] *See* Mil. R. Evid. 602, 701. *See also Beno*, 24 M.J. at 771.

[36] *Horner*, 22 M.J. at 296 ("witnesses' function in this area is to impart his/her special insight into the *accused's* personal circumstances"). *See also Ohrt*, 29 M.J. at 304 (a witness must have a rational basis for his conclusions regarding the accused's character); *Gunter*, 29 M.J. at 141 (only a witness who has a rational basis for his conclusion may express an opinion).

[37] *Beno*, 24 M.J. at 771. In *Beno* the appellant's squadron commander testified that his knowledge of the accused's character came from both reading the accused's squadron information file and a conversation that he had with the accused's first sergeant. The court stated:

> Rehabilitation potential testimony should consist of something other than a commander's shorthand recommendation that a punitive discharge be adjudged. A primary lesson of Judge Cox's opinion is that the most effective rehabilitation potential testimony is that which is presented by one who is able "to impart his/her special insight into the accused's personal circumstances." In many instances, this will be an individual who has experienced a much closer relationship with an accused than a commander. This case is a prime example of the problem presented by the trial counsel's desire to use the commander of a large organization to provide R.C.M. 1001(b)(5) input. It was quite clear that the witness barely knew the appellant, if he knew him at all.

Id. at 772 (citations omitted).

been established.[38] An expert witness (i.e., a drug and alcohol counselor) may base his or her opinion solely on reports or files maintained on the accused.[39] It is not clear, however, whether a commander can give an opinion based solely on a review of the accused's personnel files.[40] It appears that although this may be permissible, trial counsel should call a witness with more direct contact with the accused.[41]

On What Can a Witness Base His or Her Opinion?

Rehabilitation potential testimony must refer to the accused and be based upon an assessment of the accused's character and potential.[42] It cannot be based upon extraneous matters, such as: 1) administrative consequences of the accused's conviction;[43] 2) how others will act toward the accused;[44] and 3) the witness's opinion of what is best for the service.

In addition, the opinion cannot be based solely on the severity of the offense committed.[45] *Horner* prohibits trial counsel from introducing R.C.M. 1001(b)(5) evidence in cases in which an accused, with an otherwise unblemished record, is convicted of one offense. Nevertheless, if the accused has had past problems adapting to the rigors of military life (i.e., received article 15's, letters of reprimand, counseling statements, or other adverse administrative actions), then trial counsel can call witnesses to testify as to the accused's rehabilitative potential.

But what if the witness's opinion is based *in part* on the severity of the offense committed? This issue was addressed in *United States v. Stimpson*,[46] wherein the court stated: "As we understand *Horner* and *Ohrt*, a witness may weigh the nature, circumstances, and impact of the accused's offenses, together with his knowledge of the accused's character and duty performance, when deciding the question of rehabilitative potential."[47]

Recently, the Army court again took the opportunity to address this issue in *United States v. Hefner*.[48] In *Hefner*, the accused was convicted of absence without leave, disobedience of a superior commissioned officer, attempting to resist apprehension, driving while intoxicated, and wrongful use of marijuana. Trial counsel called two witnesses to testify as to the accused's rehabilitative potential. One of the witnesses, Sergeant First Class (SFC) Williams, testified that, in his opinion, the accused lacked rehabilitative potential. When asked on cross-examination whether his opinion was based solely on the offenses for which the appellant was being sentenced, SFC Williams replied, "Not just with those, sir. No, sir. Not only with those, but with his past record as well. Like I say, up to this point, the man has got four DWIs."[49] The court found that SFC Williams had a rational basis for his

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[38] *Id.* at 771. The Air Force Court of Military Review stated:

> The military judge would not have been remiss if he had totally disregarded the commander's testimony or, as we suspect happened, accorded it very little weight. Military judges should insist that one who takes the stand to offer an opinion as to an accused's rehabilitation potential is qualified to do so by virtue of his knowledge of the accused.

Id. at 772. The court reluctantly held that trial counsel had established a sufficient foundation to meet the minimum foundational requirement of *Horner*.

[39] *Gunter*, 29 M.J. at 141. In *Gunter* a sufficient foundation was established for the opinion testimony of the head of the base drug and alcohol abuse program. Judge Cox, writing for the court, noted with approval the military judge's finding that this witness qualified as an expert. Judge Cox found that the witness's review of the accused's drug rehabilitation files provided the witness with a sufficient foundation for his opinion. The files contained "information regarding appellant's progress in the rehabilitation program, including notes about his character, his efforts at rehabilitation, his determination to be rehabilitated, and other information relevant to his becoming drug-free." *Id.*

[40] The Court of Military Appeals has not directly approved of a commander, whose knowledge of the accused was gleaned from reading the accused's personnel file, giving an opinion of the accused's potential for rehabilitation. *But see Gunter*, 29 M.J. at 141 (citing *Ohrt*, 28 M.J. at 307 (Sullivan, J., dissenting)); *Ohrt*, 29 M.J. at 304 (citing *Beno*, 24 M.J. at 771).

[41] *See Beno*, 24 M.J. 771.

[42] *Ohrt*, 29 M.J. at 304 (citing *Horner*, 22 M.J. at 296).

[43] The fact "[t]hat some administrative rule or security officer might deny appellant authorization to work with classified materials is not relevant to whether she possessed the requisite character and will to [sic] become a responsible member of the military community." *Antonitis*, 29 M.J. at 220.

[44] *E.g.*, *id.* (rehabilitative evidence has to refer to the accused and be based upon an assessment of the accused's character and potential). *But see Murphy*, 29 M.J. 573 (the accused's commander testified that he did not want her [accused] back in his unit because of the "animosity" the unit felt toward her. The court found that this was a permissible comment and did not violate *Horner*). It must be noted that *Murphy* was decided one day prior to *Antonitis*.

[45] *Horner*, 22 M.J. at 294.

[46] 29 M.J. 768 (A.C.M.R. 1989).

[47] *Id.* at 769.

[48] A.C.M.R. 8901337 (A.C.M.R. 26 Jan. 1990).

[49] *Hefner*, A.C.M.R. 8901337, slip op. at 3 (A.C.M.R. 26 Jan. 1990).

opinion, even though it was based in part on the offenses committed by the accused.[50]

A derivative issue is whether a witness's opinion is automatically disqualified when the witness possesses both a sufficient foundation for his conclusion that the accused lacks rehabilitative potential and an inelastic, negative attitude toward the offenses for which the accused has been convicted. The Air Force Court of Military Review, in *United States v. Vega*,[51] held that such a witness's opinion is per se inadmissible because invariably that opinion will be premised upon his personal view of the offense and not upon a true assessment of the accused's character and potential. The Army Court of Military Review's holding in *Hefner*,[52] however, directly conflicts with *Vega*. In *Hefner* the court held that the admissibility of such a witness's opinion is a matter within the discretion of the military judge. The court formulated the following test:

> If the military judge finds that the witness' prejudice towards the offenses charged is *the* motivating factor underlying the opinion, it is inadmissible. If the military judge finds that the witness' prejudice is only *a* motivating factor and that the witness' opinion otherwise constitutes a personalized assessment of the accused character, it is admissible.[53]

Hefner is the more prudent rule, at least in light of footnote 6 in *Ohrt*.[54] The witness in *Ohrt* certainly exhibited an inelastic, negative attitude towards the offense of which the accused was convicted. But the *Ohrt* court said, "In fairness to the witness, he was not allowed to lay a foundation upon which to base his opinion."[55] This appears to indicate that, despite the commander's inflexibility in regard to the accused's crime, his opinion may have been of value if he had only been allowed to demonstrate that it was based on more than the severity of the offense.

As a general rule, as long as the witness's opinion was based on the accused's true potential for rehabilitation, how the witness came by the facts that formed the basis of the opinion is irrelevant to determining the admissibility of the opinion. A witness's opinion can be based on statements of the accused[56] or upon inadmissible hearsay.[57] However, it cannot be based on information obtained in violation of the accused's constitutional rights.[58]

What Are Appropriate Questions to Ask Your Witness?

Any question that refers "to discharge, separation from service, or lack of potential for continued service, should be scrupulously avoided."[59] Some trial counsel, without establishing an adequate foundation, use negative rehabilitation evidence to convince the court-martial that the accused's sentence should include a punitive discharge.[60] Actually, there is some logical appeal to the idea that because the accused cannot be rehabilitated, he

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[50] In an earlier case, United States v. Johnson, 26 M.J. 509 (A.C.M.R. 1988), *pet. denied*, 27 M.J. 286 (C.M.A. 1988), the court went even further by holding that testimony of witnesses regarding their opinions of the accused's rehabilitative potential based on observations of the accused and the accused's conviction were admissible, even though the opinions were based solely on the severity of the charged offenses, where the offenses were serious, several in number, and committed over an extended period of time.

The rationale given by the court has logical appeal. The witnesses, having taken into account that the accused had committed seven offenses over a period of several months, logically concluded that the accused cannot be rehabilitated and will continue to engage in future criminal conduct. However, trial counsel should not depend on this case. The same facts upon which the witnesses formed their opinions were before the court. The determination of whether the accused had rehabilitative potential could have just as easily been made by it. Allowing the witnesses to comment upon this same evidence effectively invaded the role of the court-martial to determine facts and sentence.

[51] 29 M.J. 892 (A.F.C.M.R. 1989).

[52] 29 M.J. 1022 (A.C.M.R. 1990).

[53] *Id.*

[54] *Ohrt*, 29 M.J. at 307 n.6.

[55] *Id.* Much of the case law in this area involves illegal drug offenses. Obviously, with even more serious offenses, such as murder, rape, or armed robbery, most commanders and other witnesses might be expected to have a greater prejudice toward the offenses charged. The admissibility of testimony regarding the accused's character and potential should not be dependent on the seriousness of the crime committed.

[56] *Susee*, 25 M.J. at 538.

[57] United States v. Brown, 28 M.J. 470, 475 (C.M.A. 1989) (Cox, J., dissenting) ("whether the witness' opinion was based on hearsay is irrelevant").

[58] In United States v. Nixon, 29 M.J. 505 (A.C.M.R. 1989), the witness's testimony was based on the results of an illegally obtained urinalysis result. The defense counsel objected to the witness's testimony, but was overruled by the military judge. The Army Court of Military Review found error and held that if a witness bases his or her opinion on information obtained in violation of the accused's constitutional rights, that opinion is inadmissible. *See also* Riley, *Rehabilitative Potential Evidence: Cracks in the Foundation*, The Army Lawyer, Dec. 1989, at 21. If there is another basis for the opinion other than the crime charged, there is no reason why such opinion testimony should be excluded.

[59] *Stimpson*, 29 M.J. at 770 n.2.

[60] *See supra* note 9.

or she should be discharged.[61] The Court of Military Appeals has held, however, that such evidence is irrelevant to the issue of whether or not a punitive discharge is warranted.[62] Further, such evidence does not really address rehabilitation, at least not in the broad sense of the term—that is, whether the accused has potential to reenter civilian society (not just the service) and become productive. It is this broad interpretation that presently is employed by the appellate courts when determining whether the response was proper.[63] Therefore, trial counsel may not ask questions such as: 1) What is your opinion as to his rehabilitative potential in the United States Air Force?;[64] 2) Do you have an opinion as to [accused's] potential for continued service?;[65] or 3) Whether [accused] has potential for further productive service in the military?;[66]

A proper question to ask is: "In your opinion, does the accused have rehabilitative potential?" Trial counsel should not attempt to add the words "in the Army," "in the service," or similar words or phrases.[67] This does not mean that trial counsel must limit the questions solely to rehabilitation potential. Trial counsel can also ask the witness about any sub-opinions that the witness developed in formulating an opinion of the accused's potential for rehabilitation. Questions that elicit the witness's opinion of the accused's duty performance[68] and attitude[69] have been found acceptable. Trial counsel can also ask the witness's opinion of the accused's moral fiber, the accused's determination to be rehabilitated, motivations, etc.[70] These sub-opinions are clearly foundational and general enough to be elicited before the sentencing authority. Trial counsel should avoid asking questions such as "Do you want the accused back in your unit?"[71] or "Have you ever attempted to rehabilitate the accused prior to this court-martial?"[72] These questions are presently being litigated in the appellate courts.

Except in an article 39(a) session, trial counsel must be careful not to allow the witness to mention the specific facts underlying these sub-opinions. It is incumbent upon trial counsel to interview the witnesses and rehearse their testimonies with them. If at trial the witness mentions specific acts of conduct, trial counsel should request that the military judge strike such comments as being nonresponsive.

What Is an Appropriate Response?

Once the foundation has been established and the question regarding rehabilitation potential has been formulated, the witness is now ready to give his or her opinion to the court-martial. The manner in which the witness phrases the opinion is just as critical as the foundation.

As with the trial counsel's question, any opinion referring to discharge, separation from service, or lack of potential for continued service should be scrupulously avoided.[73] The following are examples of improper opinions: "I don't think he should be allowed to stay in the Army."[74] "I don't think she should be in the [serv-

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[61] *Ohrt*, 28 M.J. at 304 (citing United States v. Ohrt, 26 M.J. 578, 582 (A.F.C.M.R. 1988) (Murdock, J.).

[62] *Id.* at 306 ("[w]e conclude that RCM 1001(b)(5) was not designed to give the prosecutor an opportunity to influence court members to punish the accused by imposing a punitive discharge").

[63] *Horner*, 25 M.J. at 296 ("Our view of 'potential for rehabilitation' is consistent with Webster's more expansive definition, because the sentencing function encompasses more than the question of whether an accused should be restored to duty.").

[64] *Clarke*, 29 M.J. at 584.

[65] *Ohrt*, 28 M.J. at 307.

[66] *Hefner*, A.C.M.R. 8901337, slip op. at 2 (A.C.M.R. 26 Jan. 1990).

[67] *Stimpson*, 29 M.J. at 770 n.2.

[68] *Ohrt*, 28 M.J. at 304; *Horner*, 22 M.J. at 294; *Susee*, 25 M.J. at 538.

[69] *Susee*, 25 M.J. at 538.

[70] *Ohrt*, 28 M.J. at 304.

[71] Oral argument before the Court of Military Appeals was held on 14 February 1990 in the cases of United States v. Aurich, A.C.M.R. 8802273 (A.C.M.R. 30 June 1989), and United States v. Cherry, A.C.M.R. 8800944 (A.C.M.R. 7 June 1989). The granted issue in each case was whether the commander could tell the sentencing authority that he did not want the accused back in his unit. Trial counsel should wait until these cases are decided before asking their witnesses this question.

[72] *Clarke*, 29 M.J. 582. In *Clarke* this question was held to be improper. The Air Force Court of Military Review found that the commander's response to this question labeled the accused a "two-time loser." *Id.* at 585.

[73] *Ohrt*, 28 M.J. at 305 ("use of euphemisms, such as "No potential for continued service"; "He should be separated"; or the like are just other ways of saying, "Give the accused a punitive discharge").

[74] *Horner*, 22 M.J. at 294.

ice]."[75] "I don't think not as far as the Army goes."[76] "I don't think that the [military] should spend any more time trying to rehabilitate him."[77]

What would be a proper opinion? The Army Court of Military Review in *Stimpson* interpreted *Ohrt* as limiting all R.C.M. 1001(b)(5) opinions to either "yes" or "no."[78] In the author's opinion, this is too restrictive.[79] Any response that addresses the accused's ability to be melded back into society as an active, productive member should be proper.[80] The witness can also give his or her opinion of the accused's duty performance[81] and attitude.[82] Trial counsel should avoid eliciting the commander's opinion as to whether he or she wants the accused back in the unit.[83]

Conclusion

Rehabilitation potential evidence is a new, developing area of the law. More guidance is needed from the appellate courts, especially from the Court of Military Appeals. Until then, the guidelines established in this article should provide some assistance in this area.

As set out above, trial counsel can put anyone on the stand to testify as to the accused's character for rehabilitation, as long as the trial counsel can establish a proper foundation for the witness's opinion. The accused's commander is only one of several witnesses who may be called to render such an opinion.

In illegal drug cases, which are the most problematic cases in this area, trial counsel should call the accused's drug and alcohol counselor, where appropriate, to give his or her opinion on the accused's potential for rehabilitation.

Trial counsel should always lay a foundation for the witnesses' opinions, but should do so outside the presence of the court members. When laying the foundation in this manner, trial counsel can present uncharged misconduct and inadmissible evidence, as long as counsel is careful not to violate the law of privileges. It is not necessary to lay the foundation outside of the presence of the court members if it consists only of evidence previously admitted under another provision of R.C.M. 1001(b).

Trial counsel must also establish that the witness's opinion is rational and personalized as to the accused's rehabilitative potential and is not based solely on the crime charged. Once the foundation is established, trial counsel can then elicit the witness's opinion of the accused's duty performance, motivation, moral fiber, determination to be rehabilitated, and finally, rehabilitative potential. Trial counsel should avoid any question that contains the words "discharge," "service," "separated," or the like. The proper question to ask is "Does the accused have rehabilitative potential?"

At all times, trial counsel should listen to the witness's answers, both on direct and cross-examination. If a witness makes a statement that specifically addresses the military (i.e., "no potential for further service," "he should be discharged"), trial counsel should seek to have the answer struck as nonresponsive. If trial counsel establishes a foundation only to have the witness give a response on cross-examination that indicates an inflexible, negative opinion as to the crime committed, trial counsel should attempt to rehabilitate the witness.

If trial counsel follow these simple rules, they will be able to avoid the many pitfalls in this developing area of the law.

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[75] *Antonitis*, 29 M.J. at 217.

[76] United States v. Savusa, 28 M.J. 1043 (A.C.M.R. 1989).

[77] *Susee*, 25 M.J. at 538.

[78] 29 M.J. at 770 n.2.

[79] *See Susee*, 25 M.J. at 538. Note, however, that *Susee* was decided prior to *Ohrt* and *Stimpson*. In *Susee* trial counsel called the first sergeant to testify as to the accused's potential for rehabilitation. Trial counsel questioned him about the accused's attitude. The first sergeant replied that the accused had told him over and over again that he [accused] did not want to be in the Army. The witness also testified:

> it ... it's clear to me that he's ... he's made it in his mind that he doesn't want to be here, he wants no part of United States Army and I don't think that the United States Army should spend any more time trying to rehabilitate him.

Id. at 540. The Army Court of Military Review found the first sergeant's statements were authorized pursuant to R.C.M. 1001(b)(5) by reference to Mil. R. Evid. 701, because they were both helpful to a clear understanding of his testimony and relevant to a determination of a fact in issue. The court found that that portion of the first sergeant's testimony referring to statements made by the accused indicating that he did not want to be in the service was not overbroad.

[80] *Beno*, 24 M.J. at 771. In *Beno* the accused's commander expressed his doubt that the appellant had rehabilitative potential, "if and when he enters back into civilian society." The court found the commander's opinion was proper under R.C.M. 1001(b)(5). *See also Horner*, 22 M.J. at 296. It is important to note, however, that *Beno* was decided prior to *Ohrt* and *Stimpson*. As a result, there is some danger that the courts could interpret such a response (about the accused's ability to be melded back into society) to be nothing more than a euphemism for urging a discharge. *See Ohrt*, 28 M.J. at 305.

[81] *Ohrt*, 28 M.J. at 304; *Horner*, 22 M.J. at 294; *Susee*, 25 M.J. at 538.

[82] *Susee*, 25 M.J. at 538.

[83] *See supra* note 71.

Trial Judiciary Note

Enhancing Ethical Awareness

Lieutenant Colonel Michael Denny
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The Army Rules of Professional Conduct (Army Rules) reinforce the responsibility of supervisors to ensure that subordinates are sensitive to the ethical requirements of their profession. In an active trial practice, ethical concerns can arise in many ways. The first concern of the supervisor is to ensure that the new attorney can recognize when an ethical concern is approaching (or already has arrived). Remedial measures, however appropriately crafted, are never as desirable as prevention.

To emphasize ethical awareness, I have found that a quiz can be very helpful. The following was developed as one of the first steps in my discussions with new counsel. Its purpose is very limited, it merely tests what the rules state. While application of these rules can be very challenging, before application must come the knowledge of what the rules cover.

In addition, the quiz shows the scope of the rules by identifying each section of the rules with a question on each. As with all tests, the "right" answer is not as important as understanding the principles involved. The most beneficial part of the quiz is the discussion afterwards.

Quiz—The Army Rules of Professional Conduct

Section 1—Client-Lawyer Relationship

Rule 1.1 Competence

True False 1. Supervisory judge advocates make the initial determination as to competence of judge advocates in the assignment of legal duties.

True False 2. A judge advocate may properly become involved in representing a client whose needs exceed the judge advocate's competence.

Rule 1.2 Scope of Representation

3. A lawyer shall abide by the client's wishes in five specific decisions in criminal cases.

   A.
   B.
   C.
   D.
   E.

True False 4. The lawyer should assume responsibility in all technical and legal tactical issues.

5. If a client expects assistance from an attorney that is not permitted by the Army Rules, the attorney has what obligation?

   _____

   _____

True False 6. The scope of services provided by a judge advocate may be limited by Army regulations.

Rule 1.3 Diligence

True False 7. A lawyer is not bound to press for every possible advantage that might be realized for a client.

True False 8. The responsibility for procrastination and its adverse impact rests with the lawyer.

Rule 1.4 Communication

True False 9. A lawyer has the obligation to communicate with the client and promptly comply with reasonable requests for information.

Rule 1.5 Fees

True False 10. Attorney fees shall be communicated to the client, preferably in writing, within a reasonable time after commencing representation.

True False 11. Rules 1.5 (a)-(e), concerning what determines a reasonable fee, are the same as the ABA Model Rules of Professional Conduct.

Rule 1.6 Confidentiality of Information

True False 12. The Army Rules differ from the ABA Model Rules pertaining to disclosure of future criminal acts contemplated by a client.

13. An attorney *shall* reveal confidential information necessary to prevent a client from committing a criminal act in two circumstances.

A.

B.

True False 14. Lawyers normally may disclose a client confidence within the office to paralegals and supervisory lawyers.

True False 15. Information relating to the representation of a client that comes to a lawyer's attention from sources other than the client is not protected by the ethical rule of confidentiality in the Army Rules.

Rule 1.7 Conflict of Interest: General Rule

True False 16. After being fully informed of a conflict of interest, a client may insist and receive representation by the attorney with the conflict.

True False 17. Questions concerning conflicts of interest are to be resolved only by the military judge and the attorney involved.

Rule 1.8 Conflict of Interest: Prohibited Transactions

True False 18. Judge advocates may not provide to a client even *de minimus* financial assistance, such as the purchase of an authorized ribbon for wear at trial.

Rule 1.9 Conflict of Interest: Former Client

True False 19. An attorney may not use generally known information about a former client in representing subsequent clients if the information was revealed by the former client in confidence.

Rule 1.10 Imputed Disqualification: General Rule

True False 20. The knowledge, actions, and conflicts of interest of one lawyer are imputed to another attorney in the same office or firm.

Rule 1.11 Successive Government and Private Employment

True False 21. A firm hires a former judge advocate who had acquired confidential information in the representation of previous clients. That firm may not represent future clients whose interests are directly adverse to the former judge advocate's clients.

Rule 1.12 Former Judge or Arbitrator

True False 22. A lawyer shall not negotiate for employment with any party or attorney for a party in a matter where the lawyer is acting as judge or arbitrator.

Rule 1.13 Army as Client

True False 23. The judge advocate represents the Army as represented by the head of the particular military organization.

True False 24. The head of the organization may, for his or her own benefit, invoke the lawyer-client privilege personally as to matters communicated during the representation.

True False 25. When the head of an agency desires to act in a manner that would be in violation of a legal obligation of the Army, the judge advocate has an affirmative duty to act in the Army's best interest.

Rule 1.14 Client Under a Disability

True False 26. If a client's ability to make considered decisions is impaired through some degree of mental disability, the attorney should try to maintain normal client relations.

True False 27. A lawyer is not normally bound by the determination of a guardian or representative properly appointed for a client. The lawyer must make a personal judgment as to the best interests of the client.

Rule 1.15 Safekeeping Property

True False 28. Judge advocates normally should not hold property of clients or third persons.

Rule 1.16 Declining or Terminating Representation

True False 29. After it has been properly determined by a defense counsel that good cause exists for terminating representation, a court may nevertheless properly order the judge advocate's continued participation.

True False 30. Withdrawal is mandatory when a client suggests the lawyer commit a criminal act or violate the Army Rules.

Section 2—Counselor

Rule 2.1 Advisor

True False 31. When asked for purely technical advice, the lawyer, in the exercise of independent judgment, may go beyond the requested advice to indicate that more may be involved than just legal considerations.

Rule 2.2 Mediation

True False 32. When a lawyer is acting as a mediator and this fact is understood by all parties, neither a lawyer-client privilege nor a lawyer-client confidentiality exists.

Rule 2.3 Evaluation for Use by Third Person

True False 33. A judge advocate may properly be called upon by the Army to prepare opinions that benefit others.

Section 3—Advocate

Rule 3.1 Meritorious Claims and Contentions

True False 34. It is a violation of the ethical rules for the lawyer to make a claim that he or she should know is frivolous.

True False 35. A lawyer does not violate the Army Rules by raising issues in good faith reliance upon court precedent.

True False 36. In raising issues of law that appear to have been resolved, it is proper for the lawyer to consider the law's potential for change.

Rule 3.2 Expediting Litigation

True False 37. Lawyers are required to make reasonable efforts to expedite litigation.

True False 38. Delays should not be indulged in to frustrate an opposing party's attempts to obtain rightful redress.

Rule 3.3 Candor Toward the Tribunal

True False 39. A lawyer who is instructed to offer evidence by his client must refuse to offer the evidence if the lawyer knows the evidence to be false.

True False 40. If false evidence has been offered by the client the usual first step by counsel is to consult with the supervising counsel.

True False 41. After a lawyer has introduced evidence, the lawyer discovers it is false. No remedial measures are necessary because the lawyer believed the evidence to be true at the time it was offered.

True False 42. If no other remedies are available, the lawyer must disclose to the court that false evidence has been presented to the court if the lawyer discovers the falsity prior to the conclusion of the proceeding.

43. A lawyer who knows that his client intends to testify falsely is given the following guidance by the commentary to the Army Rules as examples of remedial measures:

A.
B.
C.

True False 44. It may be fairly said that the Army Rules place the lawyer's duty of candor to the tribunal (Rule 3.3) above the duty to maintain client confidentiality (Rule 1.6).

True False 45. Legal argument by counsel is a discussion seeking to determine the legal premises properly applicable to the case.

True False 46. In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.5 Fairness to Opposing Party and Counsel

True False 47. Frivolous discovery requests are prohibited as unfairly impeding opposing counsel.

True False 48. The comments to the Army Rules recognize that when a client is in possession of adverse evidence, the lawyer may refrain from advising the client as to what course of action should be taken regarding the evidence.

True False 49. A lawyer has no legal right to possess contraband.

True False 50. Lawyers have the obligation to return stolen property that comes into their possession.

Rule 3.5 Impartiality and Decorum of the Tribunal

True False 51. Abusive or obstreperous behavior is inappropriate in any judicial forum.

Rule 3.6 Tribunal Publicity

True False 52. Extrajudicial statements by lawyers are limited by the restrictions on pretrial publicity.

Rule 3.7 Lawyer as Witness

True False 53. Lawyers may not testify in courts-martial, even as to uncontested matters.

Rule 3.8 Special Responsibilities of a Trial Counsel

True False 54. The command has primary responsibility to ensure that assistants to the trial counsel refrain from making improper extrajudicial statements.

True False 55. Trial counsel must disclose to the defense all evidence that tends to negate the guilt of the accused.

True False 56. Trial counsel are not required to affirmatively reveal information that pertains solely to sentencing.

Rule 3.9 Advocate in Nonadjudicative Proceedings

True False 57. In representing a client before an administrative forum in a nonadjudicative proceeding, the attorney must announce that his or her appearance is in a representative capacity.

Section 4—Transaction With Persons Other Than Clients

Rule 4.1 Truthfulness in Statements to Others

True False 58. A violation of the Army Rules can occur if a lawyer incorporates or affirms a statement of another that is known by the lawyer to be false.

Rule 4.2 Communication With Person Represented by Counsel

True False 59. It is improper to communicate with a person who is represented by an attorney on any matter, even if the matter does not directly pertain to the subject matter of the attorney-client relationship.

Rule 4.3 Dealing With Unrepresented Person

True False 60. In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested in the matter being discussed.

True False 61. Attorneys have an affirmative duty to make sure that their role in a matter involving representation is not misunderstood.

True False 62. When dealing with an unrepresented person, a lawyer representing a client with potentially adverse interests can give no advice to that person on any matter.

Rule 4.4 Respect for Rights of Third Persons

True False 63. In representing a client, a lawyer shall not use tactics that have no substantial purpose other than to embarrass or burden a third person.

Section 5—Legal Offices

Rule 5.1 Responsibilities of The Judge Advocate General and Supervisory Lawyers

64. A supervisory lawyer may be responsible for another lawyer's violation of the rules in two situations:

A.
B.

Rule 5.2 Responsibilities of a Subordinate Lawyer

True False 65. Subordinate lawyers may be held to have violated the rules, even though they have followed the guidance of their supervising lawyer on an arguable question of professional duty.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

True False 66. The supervisory lawyer of an office is the person identified as being solely responsible for the conduct of the nonlawyer assistant.

True False 67. Lawyers who are direct supervisors of nonlawyers may be held accountable for the actions of their assistants in two situations:

A.
B.

True False 68. The Army Rules directly bind nonlawyer paralegals.

Rule 5.4 Professional Independence of a Lawyer

True False 69. Notwithstanding the judge advocate's status as a commissioned officer, when representing a client the judge advocate is expected to exercise professional judgment to the same extent as a private practitioner.

Section 6—Public Service

True False 70. The section on public service in the ABA Model Rules was omitted from the Army Rules.

Section 7—Information about Legal Services

Rule 7.1 Communications Concerning a Lawyer's Services

True False 71. A lawyer is not generally precluded from making statements about his or her record for obtaining favorable results in previous cases, provided the statements are factually correct.

Rule 7.2 Advertising

True False 72. Advertising is not viewed as being part of a process that enhances the public's knowledge about legal services.

Rule 7.3 Direct Contact With Prospective Clients

True False 73. The rules permit limited direct solicitation because of the public's need to know about the availability of legal services.

Rule 7.4 Communications of Fields of Practice

True False 74. Attorneys are permitted to indicate that they are "specialists" in military law or that their practice is "limited to" military law if, in the latter case, that statement is factually correct.

Rule 7.5 Firm Names and Letterheads

True False 75. Trade names of law firms are generally permitted, although the usage may be regulated by state law.

Section 8—Maintaining the Integrity of the Profession

Rule 8.1 Bar Admission and Disciplinary Matters

True False 76. The Army Rules are not applicable to acts done by individuals prior to taking the bar examination.

True False 77. Attorneys have an affirmative duty to correct misapprehensions that may exist pertaining to their application for the JAG Corps or their application for admission to the bar.

Rule 8.2 Judicial and Legal Officials

True False 78. The Army Rules encourage the traditional effort to defend judges and courts unjustly criticized.

True False 79. A lawyer may be disciplined for violations of the Army Rules regarding statements made about judicial officials if the statements when made were known to be false or were made with reckless disregard to their truth or falsity.

Rule 8.3 Reporting Professional Misconduct

True False 80. Attorneys must report all violations of the Army Rules and must proceed according to the regulations promulgated by The Judge Advocate General.

Rule 8.4 Misconduct

True False 81. Professional misconduct under the Army Rules for active duty judge advocates extends to all prohibited acts under the UCMJ because of the unique status of judge advocates as commissioned officers.

Rule 8.5 Jurisdiction

True False 82. While fully binding on Army lawyers, the Army Rules do not supersede conflicting rules applicable in the jurisdiction in which a lawyer may be licensed.

True False 83. Lawyers practicing in state or federal civilian court proceedings must abide by the rules of the forum.

Answers and Discussion

1. True

2. True These questions reflect the traditional rule that attorneys may accept a complex case that exceeds their capabilities or current knowledge provided that, when decisions or representations need to be made, the lawyer seeks assistance or becomes knowledgeable. The supervising attorney makes that initial decision in assigning cases or other tasks.

3. A. Plea
B. Forum
C. Counsel
D. Decision to testify
E. Entering into a pretrial agreement

While these belong strictly to the client, the lawyer advises on these significant decisions. Stipulations could also be included in this list.

4. True The most significant feature of this section is the implication that the client does not make the final decision in tactical issues. Representation, particularly at trial, is a joint effort, and the attorney must keep the client informed of all the significant issues and tactical decisions. However, trial defense counsel are ultimately responsible. It is no excuse that the client wanted a particular witness called or evidence introduced.

5. Talk with the Client

As opposed to the easy option of attempting to withdraw, attorneys are obligated to do their best to explain their responsibilities.

6. True

7. True This recognizes that advocacy is truly an art and that, while selecting the best defense and developing a theory of the case, the attorney must sometimes carefully select which issues to pursue and which to forego. It is important that in making such tactical choices, the attorney keep the client informed. Failure to do so can lead to claims of ineffective assistance of counsel.

8. True

9. True This is essential in an active trial practice to keep the confidence of the client.

10. True These questions, while applicable only to civilian practitioners, were included to permit review of improper fees charged clients. This is not a subject that a judge advocate would usually discuss with a client.

11. True

12. True

13. A. Imminent death or substantial bodily harm is likely to result
B. Significant impairment of national security or capability of a military unit

In the ABA Model Rules and many state rules, it is permissive to reveal otherwise confidential information to prevent imminent death. The military's uniqueness also mandates the reporting of a significant threat to national security. Should the Army Rules ever pose a direct conflict with the rules of a state bar, then a waiver should be sought from that state, but the Army Rules supersede any conflicting rules from state jurisdictions when Army lawyers are engaged in the conduct of Army legal functions.

14. True

15. False This incorporates the view in the ABA Model Rules and represents a significant departure from the older ABA Model Code. No matter how information comes to the attention of the attorney, it is protected. This can lead to interesting questions: What if the prosecution provided the information to the defense and it was subsequently lost or stolen from the prosecutor? Could the defense counsel return the information?

16. False It is not the client who has the final word as to his representation. Ethics belong to the attorney and the profession, clients are seldom troubled by them. This issue is resolved by the military judge (see RCM 505) or by the supervising attorney.

17. False The supervising attorney is to be involved in such questions.

18. False

19. False

20. False Given the military's worldwide legal practice, such a prohibition would be unworkable.

21. False

22. True

23. True

24. False The key in this question is: The privilege is not to be invoked personally for a *personal* benefit.

25. True

26. True Many soldiers have become clients because their decisionmaking skills are impaired. This fact cannot relieve attorneys from the obligation to do the best they can for their clients.

27. False If a representative has been properly appointed for a client, then it is the representative who ordinarily makes the significant decisions for the client. The attorney becomes an advocate for the client's best interest as determined by the appointed representative.

28. True — This rule appears to be directed to civilian counsel. For judge advocate defense counsel, questions concerning property are usually related to evidentiary issues. This is addressed in Rule 3.4.—Fairness to Opposing Party and Counsel.

29. True — Declining or terminating representation should only be considered after consultation with the supervising attorney; R.C.M. 505(d)(2), R.C.M. 506(a), and R.C.M. 506(c) should be considered. Ultimately, it will be the military judge who determines if good cause exists for withdrawal after the formation of an attorney-client relationship in the court-martial context.

30. False — As with question 5, the counsel must explain the rules to the client. Withdrawal should not be the easy out.

31. True

32. True

33. True

34. True

35. True — The principle in *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), can be applied properly by the trial defense counsel. After a claim of ineffective assistance, the responsibility for preparing attorney post-trial submissions are given to a new counsel. Often the client will suggest a long list of errors committed by counsel, the judge, and the convening authority. The new counsel should raise and discuss the issues that have merit. It is appropriate to bring the client's concerns to the attention of the convening authority and appellate counsel, although they need not be argued.

36. True

37. True

38. True

39. True — The commentary to this rule sets a standard for when counsel knows the client is lying: the client has admitted the facts *and* the lawyer's independent investigation establishes that the admissions are true.

40. False

41. False

42. True

43. A. Attempt to dissuade the client
B. Seek to withdraw
C. Disclose

Rule 3.3 is taken directly from the ABA Model Rules. It is not unusual to have a client who wishes to perjure himself. After counsel has explained the rules to the client the soldier often requests a new (uninformed) counsel. Perjury does not risk death or national security, so the first lawyer violates Rule 1.6 if he or she discloses the intended perjury to the second lawyer.

44. True — This is the essential statement of philosophy resolving two rules that can be in conflict.

45. True

46. True

47. True

48. True — Rather than putting the attorney in the position of seeming to advise the client on the destruction of evidence, the commentary recognizes that there are some circumstances when the attorney should not render advice. This may be preferable to having the attorney say something to the effect, "Well, I can't advise you to destroy the evidence, but if it is ever found, you will be convicted."

49. True — It is helpful to consider property in three classes:

A. Contraband (the attorney must not take; even transporting the material to the MP's could be criminal).

B. Stolen property (the attorney must seek to have it returned).

C. Property with evidentiary value (cannot be hidden from opposing counsel).

50. True

51. True — Administrative agencies have a right to expect lawyers to deal with them with the same ethical responsibilities as the attorneys have with courts.

52. True — Army regulations specify the information permitted to be released. As a general rule, the public affairs officer is the releasing authority. For TDS officers, guidance is provided in para. 1-9 of the USATDS SOP.

53. False

54. False

55. True

56. False This identifies one of the essential differences between that of the trial and defense counsel. It can be annoying for an aggressive trial counsel to comply with such a rule. After all, why should he do the defense work for them? However, the role of the trial counsel is to seek justice and this includes the sentencing portion of trial. This rule also follows the ABA Model Rules.

57. True

58. True

59. False

60. True

61. True

62. False A lawyer may always advise another that they should seek the advice of an attorney.

63. True

64. A. The attorney orders or, with knowledge, ratifies the conduct.

B. The attorney knows of the conduct, but fails to take reasonable remedial action in time. (Once again, the rules emphasize a duty to take reasonable corrective action.)

65. False While every attorney is responsible for following the rules, application of the principles can often be difficult. In those situations, the supervising attorney's decision speaks for the firm. In those cases, the subordinate attorney can rely on the supervisor's judgment. This provision should encourage the junior attorneys to consult with supervisors on all ethical issues. Ethical concerns are simply too important not to have the considered judgment of more senior attorneys.

66. False

67. A. The attorney orders or, with knowledge, ratifies the conduct.

B. The attorney knows of the conduct, but fails to take reasonable action in time.

68. False Nonlawyers are not members of the profession and therefore are not subject to professional discipline. Para. 5-8 of AR 27-10 applies the ABA Standards for Criminal Justice to clerical support personnel. Supervisors have the obligation to give appropriate instructions and guidance to their assistants.

69. True Except, of course, concerning national security, as addressed in Rule 1-6. The judge advocate has also taken an oath to defend the Constitution and the United States.

70. True

71. False The professional concern in this instance is not correctness, but in precluding unjustified expectations in clients.

72. False

73. True

74. False As with question 70 above, the ABA takes the position that using the word "specialist" or stating that the lawyer's practice is "limited to" or "concentrated in" a particular specialty is misleading to the public. State or federally recognized specialties are permitted.

75. True

76. False

77. True

78. True

79. True

80. False All violations are not to be reported. Only violations that raise substantial questions of honesty, trustworthiness, or fitness as a lawyer in other respects.

81. False All prohibited acts do not reflect on a lawyer's fitness to practice. It is possible, however, that a judge advocate's abuse of the status of a commissioned officer can reflect on professional judgment.

82. False This section has caused some concern by attorneys who believe that following the Army Rules will jeopardize their state standing. The Army Rules closely follow the ABA Model Rules and, as more states adopt the Model Rules, the concern should be minimized. In the unlikely event of a direct conflict, a waiver should be sought from the state bar.

83. True

Clerk of Court Note

Court-Martial and Nonjudicial Punishment Rates Per Thousand

First Quarter Fiscal Year 1990; October-December 1989

	ARMYWIDE		CONUS		EUROPE		PACIFIC		OTHER	
GCM	0.48	(1.94)	0.38	(1.52)	0.72	(2.87)	0.56	(2.23)	0.00	(0.00)
BCDSPCM	0.28	(1.13)	0.27	(1.09)	0.34	(1.36)	0.20	(0.80)	0.57	(2.29)
SPCM	0.05	(0.21)	0.05	(0.20)	0.06	(0.25)	0.05	(0.19)	0.00	(0.00)
SCM	0.39	(1.57)	0.36	(1.43)	0.44	(1.74)	0.57	(2.29)	0.29	(1.14)
NJP	24.37	(97.49)	24.32	(97.27)	24.78	(99.12)	27.18	(108.73)	28.03	(112.13)

Note: Based on average strength of 766505
Figures in parentheses are the annualized rates per thousand

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

The United States Court of Military Appeals Addresses the Reserve Jurisdiction Act

For the past three years, TJAGSA instructors have taught that Congress may have written into article 3(d) of the Uniform Code of Military Justice[1] more than what the legislative and judicial history behind the Reserve Jurisdiction Act of 1986[2] reflected. The Act was enacted in response to *United States v. Caputo*,[3] in which the Court of Military Appeals held that a reservist who had been released from a two-week active duty training tour could not thereafter be tried by a court-martial for offenses committed during the active duty period.

Because of the lapse in status between Caputo's active duty training and his return to reserve status, the court held that the military no longer had jurisdiction over Caputo. The School's instructors believed that the Act may have gone beyond the *Caputo* decision because article 3(d), UCMJ, indicates that "[a] member of the reserve component who is subject to [the UCMJ] is not, by termination of a period of *active duty* or inactive duty training, relieved from amenability to ... [UCMJ] jurisdiction ... for an offense ... committed during such period of *active duty* or inactive duty training."[4] Read literally, the Act seemingly addresses not only the members of the reserve components, but also members of the active components who terminate their active service and thereafter enter into the reserve components. Such a reading appears to be contrary to the Act's legislative history, which addresses only the impact upon reserve component members, not regular component members.[5] Also, this reading is directly contrary to the prior holding of the Court of Military Appeals in *United States v. Brown*,[6] in which the court held that delivery of orders

[1] 10 U.S.C. § 803(d) (Supp. V 1987) [hereinafter UCMJ].

[2] Pub. L. No. 99-661, §§ 801-808, 100 Stat. 3816, 3905-10 (1986) [hereinafter the Act].

[3] 18 M.J. 259 (C.M.A. 1984).

[4] UCMJ art. 3(d) (emphasis added).

[5] H.R. Rep. No. 718, 99th Congress, 2d Sess. at 225-7 (1986).

[6] 31 C.M.R. 279 (C.M.A. 1962).

effecting a transfer of Brown from his four-year active duty obligation to an inactive duty status in the Naval Reserve served to end court-martial jurisdiction over Brown for offenses committed during his active duty. This reading would further constitute an exception to the general rule that delivery of a discharge certificate, along with collection of final pay, ends court-martial jurisdiction over the servicemember.[7]

The Court of Military Appeals recently decided that the Act provided jurisdiction over offenses committed by a reservist while a member of the active components, even though the reservist had left active duty with an honorable discharge.[8] The court had the opportunity to review the Act's applicability in the situation where a Marine officer left active duty after seven years of service, received an honorable discharge, and simultaneously received a commission in the Marine Corps Reserve.[9] Over a year later, the Marine Corps ordered Captain Murphy to active duty pursuant to the provisions of the Act permitting the involuntary activation of members of the reserve component for the purposes of undergoing an article 32(b) investigation.[10] The charges against Captain Murphy were preferred after his release from active duty and were for offenses committed before he left active duty.[11] Captain Murphy sought a permanent injunction from the Court of Military Appeals preventing the Marines from exercising jurisdiction over him.[12]

The court implicitly blessed the Act, but went further in resolving the jurisdictional questions against Captain Murphy. Although Captain Murphy had no further obligated service in the Marine Corps Reserve when he received his reserve commission, he did, on occasion, voluntarily participate in inactive-duty training with the reserves.[13] Without analyzing the legislative history of the Act, but merely relying on its plain language, the court held that the term "active duty" was not intended to be limited to those periods of active duty while the member is in the reserves. The court held that the term refers to all periods of active duty, regardless of whether the member is a member of the regular or reserve component at the time of the alleged offenses.[14] Nevertheless, the court expressly declined to decide the constitutional issue of whether the Act applies to a member of the inactive reserves who has no contacts with the armed forces.[15] Because of Captain Murphy's continued, voluntary contacts with the military in his inactive-duty training, the court found no constitutional impediment to exercising UCMJ jurisdiction over him.[16]

The concurring opinion in *Murphy* by Chief Justice Everett and Judge Sullivan may signal further expansion of UCMJ jurisdiction. The judges expressly recognize that *Murphy* may go beyond the Supreme Court's decision in *United States ex rel. Hirshberg v. Cooke*.[17] In *Hirshberg* the Court held that no UCMJ jurisdiction existed over a sailor for an offense committed during a prior enlistment that had been terminated by an honorable discharge, even though the sailor reenlisted on the day following his discharge. In interpreting the Act, Chief Judge Everett and Judge Sullivan concluded that Congress intended to change the result in *Hirshberg*.[18] This conclusion expressly disregards the legislative history of the Act: "With respect to the proposed amendment of Article 3, the committee intends not to disturb the jurisprudence of *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210 (1949)."[19] *Murphy v. Garrett* represents a major, if not a far-reaching, decision regarding jurisdiction over former members of the regular components of the armed forces who immediately embark upon life as a military reservist. MAJ Holland.

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[7] United States v. Howard, 20 M.J. 353 (C.M.A. 1985).

[8] Murphy v. Garrett, 29 M.J. 469 (C.M.A. 1990).

[9] *Id.* at 470.

[10] UCMJ art. 2(d).

[11] 29 M.J. at 470.

[12] *Id.* at 469.

[13] *Id.* at 470. *See also id.* at 472 (concurring opinion) (during oral argument before the Court of Military Appeals, appellate defense counsel conceded that the accused had participated in military drills a dozen or more times after accepting his reserve commission).

[14] *Id.* at 471. In the case, the court concerned itself with the definition of "active duty" in UCMJ art. 2(d)(2)(A). UCMJ art. 2(d) essentially implements the continuing jurisdiction of UCMJ art. 3(d) in that it allows a member of the reserve component to be ordered to active duty for court-martial concerning offenses committed on active duty or inactive duty training.

[15] *Id.*

[16] *Id.*

[17] 336 U.S. 210 (1949).

[18] 29 M.J. at 472 (Everett, C.J., and Sullivan, J., concurring).

[19] H.R. Rep. No. 718, 99th Congress, 2d Sess. at 227 (1986).

The Legality of the "Safe-Sex" Order When the "Victim" is a Civilian

Over the past two years, several military appellate decisions,[20] articles,[21] and notes[22] have addressed the legality of the so-called "safe-sex" order[23] for soldiers with the Human Immunodeficiency Virus (HIV),[24] which causes AIDS.[25] These authorities who have considered the issue have been unanimous in concluding that the "safe-sex" order is a lawful military order in some circumstances.

Until recently, the appellate courts have had little occasion to address whether the order has a sufficient military nexus if the servicemember's sexual partner is a civilian. Two recent court of review decisions—*United States v. Sargeant*[26] and *United States v. Ebanks*[27]—have considered this issue. These decisions concluded that, at least in some cases, the "safe-sex" order is adequately related to valid military duties and purposes to be lawful, even when the victim is a civilian. These cases used different rationales, however, in reaching this conclusion.

Black letter military law provides that commanders have the authority to regulate the activities of their subordinates to accomplish a military duty or purpose.[28] Any orders issued upon this basis must directly relate to a military duty to be lawful.[29] The Manual for Courts-Martial[30] defines the relationship of an order to a military duty quite broadly:

> The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs. However, the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order. Disobedience of an order which has for its sole object the attainment of some private end, or which is given the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article.[31]

The first cases considering the legality of the "safe-sex" order generally involved circumstances where the accused's sexual partners were also in the military.[32] In these cases, the courts had little difficulty in finding a

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[20] *E.g.*, United States v. Womack, 29 M.J. 88 (C.M.A. 1989), *affirming*, 27 M.J. 630 (A.F.C.M.R. 1988); United States v. Dumford, 28 M.J. 836 (A.F.C.M.R. 1989); United States v. Negron, 28 M.J. 775 (A.C.M.R. 1989).

[21] *E.g.*, Milhizer, *Legality of the "Safe-Sex" Order to Soldiers Having AIDS*, The Army Lawyer, Dec. 1988, at 4; Wells-Petry, *Anatomy of an AIDS Case: Deadly Disease as an Aspect of Deadly Crime*, The Army Lawyer, Jan. 1988, at 17.

[22] *E.g.*, TJAGSA Practice Note, *Army Court of Military Review Holds that the "Safe-Sex" Order is Constitutional*, The Army Lawyer, Mar. 1990, at 35; TJAGSA Practice Note, *Court of Military Appeals Decides AIDS-Related Cases*, The Army Lawyer, Dec. 1989, at 32; TJAGSA Practice Note, *AIDS Update*, The Army Lawyer, Mar. 1989, at 29.

[23] The Army's regulation requiring commanders to issue the "safe-sex" order in appropriate cases is Army Reg. 600-110, Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV) (11 Mar. 1988) (IC, 2824Z Mar. 1989) (IO1, 22 May 1989) [hereinafter AR 600-110]. The sample order is stated in the following terms; "You will verbally advise all prospective sexual partners of your diagnosed condition before engaging in any sexual intercourse. You are also ordered to use condoms should you engage in sexual intercourse with a partner." *Id.*, figure 2-2. The soldier is also ordered not to donate blood, sperm, organs, or other tissues; and to notify health care workers of his diagnosed condition prior to seeking or receiving treatment. *Id.* The other services require commanders to issue similar "safe-sex" orders. *See generally* Milhizer, *supra* note 21, at 4 n.3.

[24] The military tests for the presence of the HIV antibody, rather than testing directly for the virus. The presence of an HIV antibody indicates that the person has been exposed to AIDS. It does not mean that the person has AIDS or will necessarily develop AIDS, nor does it mean that the person has developed an immunity to AIDS. Baruch, *AIDS in the Courts: Tort Liability for the Sexual Transmission of Acquired Immune Deficiency Syndrome*, 22 Torts & Ins. L.J. 165, 167 (1987). Many researchers now believe, however, that nearly all infected persons will have progression of illness and develop AIDS. Capofari & Wells-Petry, *The Commander's Duties in Army's AIDS Policy*, Army Magazine, Sept. 1988, at 11.

[25] AIDS is the acronym for Acquired Immunodeficiency Syndrome. A person with AIDS has the HIV virus, which damages the body's immune system. Each of us has innate or natural immunities. We also acquire immunities, some even before birth. A fundamental element of the immune system is the T-lymphocytes, which multiply to combat infections. T-lymphocytes are divided into two groups: T-helper cells and T-suppressor cells. T-helper cells assist mobilizing other T-lymphocytes and enhance the responsiveness of the immune system in fighting infections. T-suppressor cells become important after the infection has been fought off, as they inhibit the activity of the T-lymphocytes and terminate the immune system's response. In a person with AIDS, the HIV has infected and damaged the T-helper cells, rendering the person immunoincompetent and thus susceptible to a variety of opportunistic infections which can cause death. *See generally* Facts About AIDS, United States Public Health Service, Winter 1986 Public Information Release; Surgeon General's Report on Acquired Immune Deficiency Syndrome, United States Public Health Service, Oct. 1986; Milhizer, *supra* note 21, at 4.

[26] 29 M.J. 812 (A.C.M.R. 1989).

[27] 29 M.J. 926 (A.F.C.M.R. 1989).

[28] *Negron*, 28 M.J. at 776 (citing United States v. Martin, 5 C.M.R. 102 (C.M.A. 1952)).

[29] *See* Unger v. Ziemniak, 27 M.J. 349 (C.M.A. 1989); United States v. Green, 22 M.J. 711 (A.C.M.R. 1986).

[30] Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984].

[31] MCM, 1984, Part IV, para. 14c(2)(a)(iii).

[32] *E.g.*, *Womack*, 29 M.J. at 89-90; *Negron*, 28 M.J. at 776.

direct military purpose for the order. Indeed, the Court of Military Appeals observed in this regard that "[t]he military, and society at large, have a compelling interest in having those who defend the nation remain healthy and capable of performing their duty."[33] This result makes good sense, as

> few activities could conceivably have as detrimental an impact on mission accomplishment, morale, good order, and discipline as would the spread of AIDS within a military organization. The likely adverse impact on morale would remain nearly as great, even where the disease was not transmitted, once the uninformed and unprotected sexual partners later learn of the soldier's diagnosed condition.[34]

The first military case to consider the legality of the "safe-sex" order when the accused's partner was a civilian was *United States v. Dumford*.[35] The court in *Dumford* concluded broadly that the order had a military purpose because "the bond between the armed services and the civilian population would quickly become dangerously frayed if the military took the position that it had no obligation to attempt to prevent the spread of AIDS in the nation at large."[36] The court in *Sargeant*[37] took an equally expansive view, commenting in dicta[38] that "the military has a proper interest in taking reasonable steps to ensure that its soldiers who have the AIDS virus do not infect their sexual partners, regardless of their status."[39] The courts' conclusion in *Dumford* and *Sargeant* is apparently predicated on the rationale that commanders have a legitimate and important duty to limit service discrediting conduct by their subordinates. The existence of such a duty is well supported by the decisional law.[40]

The court in *Ebanks*[41] relied on a different rationale for finding a military purpose for the "safe-sex" order when some of the accused's partners were civilians. The court observed in that case that

> the uninformed or unprotected sex that violated the order was with one partner who was another Air Force member and two others who were dependent wives of Air Force members. All three individuals were entitled to medical care from military medical facilities and had the potential for further sexual activity with other military members. The valid military purpose of appellant's order was to prevent the spread of a deadly, contagious disease and by doing so safeguard the health of members of the Air Force to insure their ability to perform Air Force missions.[42]

The court's recognition of the comparably strong military nexus for the order, where the civilian partners are military dependents, is well founded. The adverse impact upon morale, good order, and discipline would be predictable and significant where the disease is transferred within the military community. Moreover, the governmental interest of avoiding the spread of AIDS to healthcare beneficiaries and civilian employees is both obvious and reasonable.[43]

As the quoted language from *Ebanks* indicates, the court also based its conclusion that the order had a sufficient military nexus on the risk of the disease being transferred to other servicemembers via the accused's civilian sex partners. The chances of transmission of the virus is certainly direct and substantial when the civilian who is placed at risk by the accused is the spouse of another military member. The risk of indirect transmission to another military member is more attenuated, however, when the accused's civilian partner is not directly affiliated with the military. As was previously observed:

> Any projected transmission back to the post via a[n unaffiliated] civilian is certainly hypothetical and,

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[33] *Womack*, 29 M.J. at 90.

[34] Milhizer, *supra* note 21, at 6 (footnote omitted).

[35] 28 M.J. 836 (A.F.C.M.R. 1989).

[36] *Id.* at 838.

[37] 29 M.J. 812 (A.C.M.R. 1989).

[38] The victims in *Sargeant* were other servicemembers. *Id.* at 814.

[39] *Id.* at 815 n.6.

[40] The courts and boards have found, for example, that intentionally failing to pay a civilian a just debt, United States v. Kirksey, 20 C.M.R. 272 (C.M.A. 1955), and public drunkenness, United States v. McMurtry, 1 C.M.R. 715 (A.F.B.R. 1951), constitute service discrediting conduct. With regard to sexually-related activities, the appellate courts and boards have determined that public cohabitation in the civilian community, United States v. Leach, 22 C.M.R. 178 (C.M.A. 1956), and cross-dressing, United States v. Davis, 26 M.J. 445 (C.M.A. 1988), are likewise service discrediting.

[41] 29 M.J. 926 (A.F.C.M.R. 1989).

[42] *Id.* at 929.

[43] Milhizer, *supra* note 21, at 6.

at best, attenuated. Serious issues as to causation generally, and intervening cause in particular, could also be raised. Such a broad theory of liability would also expand the concept of military duty to include a whole range of activities generally thought to be outside the scope of its limits.[44]

The Court of Military Appeals has yet to decide whether the "safe-sex" order is overbroad as applied to civilians. Even if the court concluded that it was overbroad in some cases, this result would not cause the order to be unenforceable in cases where a clear military nexus is established, i.e., soldier-to-soldier contact.[45]

> Certainly a soldier could not complain that he lacked fair notice regarding the legality of his conduct, as the various counselling sessions and the commanding officer's order would provide such notice. Similarly, even if the "safe-sex" order intrudes impermissibly upon constitutionally protected areas in some cases, this would not invalidate the order when applied in circumstances clearly lacking in those protections.[46]

Although reasonable arguments to the contrary can be offered, the Court of Military Appeals will probably conclude that the "safe-sex" order has a sufficient military nexus in most cases where the accused sexual partner is a civilian. MAJ Milhizer.

The Meaning of "Duty" for Drunk on Duty

In *United States v. Hoskins*[47] the Court of Military Appeals addressed the scope of the term "duty" when used in the context of the offense of drunk on duty.[48] The court concluded that, at least under the facts of *Hoskins*, reporting for duty in a drunken stupor did not constitute being drunk on duty. The court found, however, that such conduct did amount to the less serious offense of incapacitation for performance of duties through drunkenness.[49]

The stipulated facts in *Hoskins* indicate that the accused appeared to be intoxicated when he reported for duty on 20 April 1988.[50] A blood alcohol test was thereafter performed, which showed that the accused had a blood alcohol level of 2.55 percent. On 28 April 1988, the accused met with his company commander, who observed that the accused seemed both exhausted and intoxicated. A breathalyzer test was therefore administered upon the accused. The test results confirmed that the accused was, in fact, intoxicated. The accused later admitted to the military judge during the providence inquiry relating to these offenses[51] that he was arriving for work on both occasions when his drunken state was discovered. The military judge accepted the accused's guilty pleas to two specifications of being drunk on duty and entered findings accordingly.

Article 112 proscribes being drunk on duty as follows: "Any person subject to this chapter other than sentinel or look-out, who is found drunk on duty, shall be punished as a court-martial may direct."[52] The offense has two elements: 1) that the accused was on a certain duty; and 2) that he was found drunk while on this duty.[53] The 1984 Manual defines duty as including "any military duty"[54] and describes the nature of the offense, in part, as follows:

> It is necessary that the accused be found drunk while actually on the duty alleged, and the fact the accused became drunk before going on duty, although material in extenuation, does not affect

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[44] *Id.*

[45] *See generally* Parker v. Levy, 417 U.S. 733, 752-57 (1974).

[46] Milhizer, *supra* note 21, at 7 (footnotes omitted).

[47] 29 M.J. 402 (C.M.A. 1990).

[48] A violation of UCMJ art. 112.

[49] A violation of UCMJ art. 134; *see* MCM, 1984, Part IV, para. 76.

[50] *Hoskins*, 29 M.J. at 403.

[51] The accused was charged with two violations of article 112: one pertaining to the 28 April incident and the other pertaining to the 20 April incident. *Id.*

[52] *See* MCM, 1984, Part IV, para. 36.

[53] *Id.*, Part IV, para. 36b

[54] *Id.*, Part IV, para. 36c(2). The Manual further defines duty as follows:

> Every duty which an officer or enlisted person may legally be required by superior authority to execute is necessarily a military duty. Within the meaning of this article, when in the actual exercise of command, the commander of a post, or of a command, or of a detachment in the field is constantly on duty, as is the commanding officer on board a ship. In the case of other officers or enlisted persons, "on duty" relates to duties of routine or detail, in garrison, at a station, or in the field, and does not relate to those periods when, no duty being required of them by orders or regulations, officers and enlisted persons occupy the status of leisure known as "off duty" or "on liberty." In a region of active hostilities, the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of this article. So also, an officer of the day and members of the guard, or of the watch, are on duty during their entire tour within the meaning of this article.

Id.

> the question of guilt. If, however, the accused does not undertake the responsibility or enter upon the duty at all, the accused's conduct does not fall within the terms of this article, nor does that of a person who absents himself or herself from duty and is found drunk while so absent.[55]

The accused in *Hoskins* contended on appeal that his pleas of guilty should be set aside because he was not "on duty" as required by the statute. The Army Court of Military Review disagreed, concluding that arriving or showing up for work meets the "on duty" requirement for article 112.[56] The court relied primarily upon the 1952 case of *United States v. Dixon*,[57] where the Air Force Board of Review commented in dicta[58] that "[t]he offense of 'drunk on duty' may be committed by a person who has reported for work in a drunken condition at his place of duty at the appointed time."[59]

The Court of Military Appeals disagreed. The court noted that the legislative history to article 112 refers to Article of War 85 as its predecessor.[60] As the corresponding paragraph to the 1928 Manual for Courts-Martial explains:

> A person is not found drunk on duty in the sense of this article, "if he is simply discovered to be drunk when ordered, or otherwise required, to go upon the duty, upon which, because of his condition, he does not enter at all." But the article does apply although the duty may be of a merely preliminary or anticipatory nature, such as attending an inspection by a soldier designated for guard, or an awaiting by a medical officer of a possible call for his services.[61]

The Court of Military Appeals also distinguished and limited *Dixon* on several bases. The court initially noted that the quoted language from *Dixon*, relied upon by the court of review in *Hoskins*, was only dicta.[62] The court next commented that the board in *Dixon*—by equating reporting for duty with entering upon a duty—construed several pre-UCMJ service opinions too broadly.[63] Finally, the court observed that the 1984 Manual's analysis of article 112[64] does not cite *Dixon*, but instead cites *United States v. Burroughs*,[65] a case that the court characterizes as "impliedly undermin[ing] *Dixon*'s sweeping dicta."[66]

The Court of Military Appeals nevertheless concluded in *Hoskins* that the accused's misconduct constituted a violation of the less serious offense of incapacitation for duty by reason of drunkenness.[67] The court noted that this offense (incapacitation for duty because of drunken-

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[55] *Id.*, Part IV, para. 36c(3).

[56] United States v. Hoskins, CM 8801340, slip op. at 2 (A.C.M.R. 10 Nov. 1989) (unpub.).

[57] 2 C.M.R. 823 (A.F.B.R. 1952).

[58] The conviction in *Dixon* was set aside because the government failed to prove a specific duty location and time. *Id.*

[59] *Id.* at 824. The board wrote:

> In such a case it would be no defense that [the accused] was in no condition to perform any duties and in fact performed none. From the time he reported, apparently purporting to enter upon his duties, he would be on duty, the act of reporting for duty constituting an undertaking of the responsibility and an entering upon the duty.

Id.

[60] *Hoskins*, 29 M.J. at 404 (citing Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess. 1230 (1949)).

[61] MCM, 1928 (rev. ed.), para. 145 (citation omitted). The Court of Military Appeals in *Hoskins* also cites Davis, A Treatise on the Military Law of the United States 408-09 (3d ed. 1913 Revision), as support for the distinction between arriving for duty while intoxicated and being intoxicated while on duty.

[62] *See supra* note 58.

[63] *See* W. Winthrop, Military Law and Precedents 611-15 (2d ed. 1920 Reprint).

[64] MCM, 1984, Part IV, para. 36 analysis, app. 21, at A21-94.

[65] 37 C.M.R. 775 (C.G.B.R. 1966).

[66] *Hoskins*, 29 M.J. at 405.

[67] A violation of UCMJ art. 134; *see* MCM, 1984, Part IV, para. 76; *see generally* United States v. Fretwell, 29 C.M.R. 193, 196 (C.M.A. 1960). This offense has four elements:

> (1) That the accused had certain duties to perform;
>
> (2) That the accused was incapacitated for the proper performance of such duties;
>
> (3) That such incapacitation was the result of previous wrongful indulgence in intoxication liquor or any drug; and
>
> (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, 1984, Part IV, para. 76b; *see generally* United States v. Roebuck, 8 C.M.R. 786 (A.F.B.R. 1953); United States v. Nichols, 6 C.M.R. 239 (A.B.R.), *pet. denied*, 6 C.M.R. 130 (C.M.A. 1952). The Manual explains that incapacitated means "unfit or unable to perform properly. A person is 'unfit' to perform duties if at the time the duties are to commence, the person is drunk, even though physically able to perform the duties. Illness resulting from previous overindulgence is an example of being 'unable' to perform duties." *Id.*, Part IV, para. 76c(2).

ness) is closely related to the crime of being drunk on station,[68] which is recognized as being a lesser included offense of the charge to which the accused pleaded guilty.[69] Accordingly, the court affirmed the accused's conviction for the less serious offense of being drunk on station based on the rationale of *United States v. Epps*.[70]

Hoskins teaches one other lesson. The Court of Military Appeals apparently recognized that, in some cases, arriving drunk for a preliminary duty could constitute a violation of article 112.[71] This position is consistent with the Manual's language that "[i]ncluded within the article [112] is drunkenness while on duty of an anticipatory nature such as that of an aircraft crew ordered to stand by for flight duty, or of an enlisted person ordered to stand by for guard duty."[72] The court noted in *Hoskins*, however, that such a preliminary duty "was not particularly alleged or admitted in this case as otherwise required."[73] Thus, trial counsel intending to rely upon the rationale of a preliminary duty to establish an article 112 violation must ensure that the anticipatory duty is of the nature contemplated by the Manual, is specifically alleged in the specification, and is proven or admitted to at trial. MAJ Milhizer.

Mixing Theories Under the General Article

Introduction

Article 134,[74] the so-called general article, is a unique statutory feature of the Uniform Code of Military Justice. It provides commanders and prosecutors with an unparalleled flexibility in punishing misconduct that is not specifically proscribed by the military's criminal code.

As the recent case of *United States v. Sadler*[75] illustrates, the scope of article 134 is not boundless. The Court of Military Appeals has made it clear that in trials involving charges under article 134, all parties at the court-martial must be cognizant of the specific theory or theories of prosecution relied upon and the distinct requirements of proof for each. Before discussing the specific facts of *Sadler*, a review of article 134 is appropriate.

Elements of Proof

Article 134 provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.[76]

As the text makes clear, article 134 provides for three distinct theories of prosecution: 1) Conduct prejudicial to good order and discipline; 2) Conduct of a nature to bring discredit upon the armed forces; and 3) Conduct constituting a non-capital crime not punishable under another article of the UCMJ.

The elements of proof for an article 134 offense depend upon the theory of prosecution and the nature of the conduct. If charged under clause 1 (disorder or neglect to the prejudice of good order and discipline in the armed forces) or clause 2 (of a nature to bring discredit upon the armed forces), the following two elements of proof are required: 1) that the accused did or failed to do certain acts; and 2) that, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[77]

If charged under the third clause (as a crime or offense not capital), the proof must establish every element of the crime or offense incorporated or assimilated as required

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[68] A violation of UCMJ art. 134.

[69] MCM, 1984, Part IV, para. 36d.

[70] 25 M.J. 319 (C.M.A. 1987); *see also* United States v. Hubbard, 28 M.J. 203, 205 (C.M.A. 1989).

[71] *Hoskins*, 29 M.J. at 405.

[72] MCM, 1984, Part IV, para. 36c(3).

[73] *Hoskins*, 29 M.J. at 405.

[74] UCMJ art. 134. Much of the source material for this note is taken from the Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1, published by the Criminal Law Division, The Judge Advocate General's School of the Army. Persons interested in obtaining a copy of this deskbook can order it through the Defense Technical Information Center. The procedures for ordering the deskbook are found in the Current Material of Interest section of *The Army Lawyer*.

[75] 29 M.J. 370 (C.M.A. 1990).

[76] *Id.*

[77] *See* MCM, 1984, Part IV, para. 60b.

by the applicable law.[78] The Court of Military Appeals has recently reiterated, however, that "a facial similarity between a military offense and a Federal crime does not mean that the offense must be brought under the third clause of Article 134. Rather, where appropriate, the charge may be brought under any one of the three clauses."[79] When the misconduct is charged under the first two clauses of article 134, the requirements of proof for the crime "are not dictated by the elements of similar offenses denounced by the federal code."[80]

Conduct Punishable Under the First Clause

As noted, the first clause of article 134 reaches conduct that is prejudicial to good order and discipline in the armed forces. As the Manual for Courts-Martial indicates, not every irregular, mischievous, or improper act is a court-martial offense under the first clause.[81] Rather, the conduct must be directly and palpably prejudicial to good order and discipline to constitute a violation of the first clause of article 134.[82]

A breach of a custom of the service may result in a violation of article 134 under the first clause. To serve as the basis for an article 134 offense, the custom must satisfy the following requirements: 1) be a long established practice; 2) have a common usage attaining the force of law; and 3) not be contrary to military law.[83] The conduct ceases to be recognized as a custom when its observance has been abandoned.[84]

The conduct reached by the first clause of article 134 includes all of the offenses enumerated in Part IV of the 1984 Manual, at paragraphs 61-113. Some common examples of enumerated offenses prohibited by clause one of article 134 are indecent assault,[85] dishonorably failing to pay a just debt,[86] and false swearing.[87]

The enumerated offenses do not, however, comprise an exhaustive list of clause one violations. Other novel offenses may be charged, provided the alleged misconduct satisfies the gravamen of clause one and the misconduct cannot be prosecuted under another article of the UCMJ.[88] For example, having unprotected sexual intercourse by knowingly exposing a partner to the HIV virus has recently been found to violate the first clause of article 134.[89] Clause one violations have likewise been affirmed for cross-dressing on a military installation;[90] setting off a false fire alarm and writing on the doors of an Air Force dormitory;[91] being a "Peeping Tom" in a women's latrine;[92] and glue-sniffing aboard ship with the intent to become intoxicated.[93]

Conduct Punishable Under the Second Clause

The second clause of article 134 reaches service discrediting conduct. To constitute a violation of clause two, the conduct must have the tendency to bring the service into disrepute or to lower the service in public esteem.[94] Conduct will be service discrediting when civilians are aware of both the military status of the offender and the discrediting nature of the behavior.[95] Conduct that is open and notorious may be service discrediting, while wholly private conduct is not generally reached by article 134.[96] As with the first clause, prohibited conduct

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[78] United States v. Bailey, 28 M.J. 1004, 1006 (A.C.M.R. 1989) (citing United States v. Ridgeway, 13 M.J. 742, 746 (A.C.M.R. 1982), and United States v. Chodkowski, 11 M.J. 605, 607 n.3 (A.F.C.M.R. 1981)).

[79] United States v. Williams, 29 M.J. 41, 42 (C.M.A. 1989).

[80] *Bailey*, 28 M.J. at 1006 (citing *Ridgeway*, 13 M.J. at 746; *Chodkowski*, 11 M.J. at 607; United States v. Long, 6 C.M.R. 60 (C.M.A. 1952); United States v. Rehak, 25 M.J. 790 (A.C.M.R.), *pet. denied*, 27 M.J. 18 (C.M.A. 1988); United States v. Caudill, 10 M.J. 787 (A.F.C.M.R. 1981)).

[81] *See* MCM, 1984, Part IV, para. 60c(2)(c).

[82] United States v. Sandinsky, 34 C.M.R. 343, 345 (C.M.A. 1964) (citing United States v. Holiday, 16 C.M.R. 28 (C.M.A. 1954)).

[83] MCM, 1984, Part IV, para. 60c(2)(b); *see* United States v. Smart, 12 C.M.R. 826 (A.F.B.R. 1953) (the custom must be certain, continuous, uniform, and notorious).

[84] *Smart*, 12 C.M.M. 826 (A.F.B.R. 1953).

[85] MCM, 1984, Part IV, para. 63.

[86] *Id.*, Part IV, para. 71.

[87] *Id.*, Part IV, para. 79.

[88] United States v. Wright, 5 M.J. 106 (C.M.A. 1978).

[89] United States v. Woods, 28 M.J. 318 (C.M.A. 1989).

[90] United States v. Davis, 26 M.J. 445 (C.M.A. 1988).

[91] United States v. Kopp, 9 M.J. 564 (A.F.C.M.R. 1980).

[92] United States v. Johnson, 4 M.J. 770 (A.C.M.R. 1978).

[93] United States v. Limardo, 39 C.M.R. 866 (N.B.R. 1969).

[94] MCM, 1984, Part IV, para. 60c(3).

[95] United States v. Kirksey, 20 C.M.R. 272 (C.M.A. 1955).

[96] United States v. Berry, 20 C.M.R. 325 (C.M.A. 1956); *see* United States v. Hickson, 22 M.J. 146 (C.M.A. 1986); United States v. Carr, 28 M.J. 661 (A.F.C.M.R. 1989).

includes both offenses enumerated in the Manual and other novel offenses that are service discrediting. Often, misconduct is alleged as violations of the first two clauses of article 134 in the conjunctive.

Conduct Punishable Under the Third Clause

Some civilian criminal statutes may be prosecuted as violations of military law under the third clause of article 134.[97] As the Manual explains:

> State and foreign laws are not included within the crimes and offenses not capital referred to in this clause of Article 134 and violations thereof may not be prosecuted as such except when State law becomes Federal law of local application under section 13 of title 18 of the United States Code (Federal Assimilative Crimes Act). For the purpose of court-martial jurisdiction, the laws which may be applied under clause 3 of Article 134 are divided into two groups: crimes and offenses of unlimited application (crimes which are punishable regardless where they may be committed),[98] and crimes and offenses of local application (crimes which are punishable only if committed in areas of federal jurisdiction).[99]

When prosecuted as a violation of a specific federal statute, the offense must occur in a place where the law in question applies.[100] As noted earlier, the elements of the federal statute are controlling for prosecutions under the third clause.[101] A specification containing allegations of fact insufficient to establish a violation of a designated federal statute may nonetheless be sufficient to constitute a violation of article 134 under the first or second theory.[102]

The Federal Assimilative Crimes Act[103] adopts unpreempted state offenses as the local federal law of application, thus permitting the prosecution of such offenses under clause three of article 134. The Act applies state law to the military regardless of whether it was enacted before or after passage of the Act.[104] The purpose of the Act is to fill the gaps left by the specific federal statutes.[105] The government, of course, must establish exclusive or concurrent federal jurisdiction before the Act is applicable.[106] The Act may not be used to extend or narrow the scope of the existing federal criminal law.[107]

Military law has established two important limitations upon the third clause of article 134. The first limitation is known as the preemption doctrine. This doctrine provides that a federal statute may not be incorporated or a state statute assimilated under article 134 if the same conduct is specifically punishable under another article of the UCMJ.[108] The Court of Military Appeals has established a two-part test for determining whether a statute is preempted: 1) Did Congress intend to limit prosecution within a particular area or field to offenses

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[97] *See generally* MCM, 1984, Part IV, para. 60c(4); United States v. Reichenbach, 29 M.J. 128 (C.M.A. 1989) (designer drugs).

[98] The Manual explains elsewhere that

> [c]ertain noncapital crimes and offenses prohibited by the United States Code are made applicable under clause 3 of Article 134 to all persons subject to the code regardless where the wrongful act or omission occurred. Examples include: counterfeiting (18 U.S.C. § 471), and various frauds against the Government not covered by Article 132.

Id., Part IV, para. 60c(4)(b).

[99] *Id.*, Part IV, para. 60c(4)(a) (citation omitted).

[100] MCM, 1984, Part IV, para. 60c(4)(i); *see* United States v. Williams, 17 M.J. 207 (C.M.A. 1984); United States v. Clark, 41 C.M.R. 82 (C.M.A. 1969).

[101] United States v. Ridgeway, 13 M.J. 742 (A.C.M.R. 1982). A servicemember, however, can be convicted of an attempt to commit a federal offense under the third clause of article 134, even if the underlying federal statute has no attempt provision. United States v. Craig, 19 M.J. 166 (C.M.A. 1985).

[102] United States v. Mayo, 12 M.J. 286 (C.M.A. 1982) (even though an improperly pleaded specification under 18 U.S.C. § 844(e) failed to allege a "bomb threat" offense under the United States Code, it was sufficient to support a conviction of prejudicial conduct under the first theory of article 134); *see* United States v. Gould, 13 M.J. 734 (A.C.M.R. 1982).

[103] 18 U.S.C. § 13 (1982).

[104] United States v. Rowe, 32 C.M.R. 302, 309 (C.M.A. 1962).

[105] United States v. Picotte, 30 C.M.R. 196 (C.M.A. 1961).

[106] United States v. Irvin, 21 M.J. 184 (C.M.A. 1980); *see* United States v. Kline, 21 M.J. 366 (C.M.A. 1986) (a guilty plea may establish jurisdiction under the Act).

[107] United States v. Perkins, 6 M.J. 602 (A.C.M.R. 1978).

[108] *See* MCM, 1984, Part IV, para. 60c(5)(a).

defined in a specific article of the UCMJ? and 2) Is the offense charged a residuum of elements of a specific offense and asserted to be a violation of either UCMJ articles 133[109] or 134?[110] Preemption applies if either question is answered affirmatively.

The military decisional law has addressed the preemption issue on numerous occasions. For example, prosecution under 18 U.S.C. § 842(h) for possession of stolen explosives is not preempted by the UCMJ.[111] Other state statutes that are not preempted include a state statute prohibiting wrongfully eluding a police officer;[112] a state kidnapping statute;[113] a state auto burglary statute;[114] and a state statute prohibiting hunting at night.[115] State child abuse statutes will be preempted if the conduct that is prohibited thereunder amounts to no more than an assault under article 128.[116] On the other hand, the Army Court of Military Review has determined that a state statute prohibiting false reports of crimes is preempted by UCMJ article 107.[117]

The second limitation upon clause three of article 134 is known as the capital crimes exception.[118] This limitation provides that only non-capital civilian offenses may be prosecuted under the third clause.[119] Capital crimes are defined as those crimes made punishable by death under the common law or by statute of the United States. Capital offenses may likewise not be charged as a violation of article 134 under the first or second clauses of article 134.[120]

United States v. Sadler

The accused in *Sadler* was tried under article 134, *inter alia*, for two offenses: 1) contributing to the delinquency of a minor by giving her alcoholic beverages; and 2) sexually exploiting the same minor by taking lewd photographs of her genital area.[121] Although both specifications indicated that the alleged conduct was prohibited by provisions of the New Mexico criminal statutes,[122] they were each charged as constituting service discrediting conduct in violation of the second clause of article 134.[123]

In reviewing the lawfulness of the accused's conviction for these offenses, the Court of Military Appeals noted that when a servicemember is tried under the third clause of article 134, the government need not allege or prove that his conduct was prejudicial to good order and discipline or service discrediting within the contemplation of the other two clauses of the article.[124] The court noted further that the specifications at issue in *Sadler*, although alleging violations of state law, were laid under the second clause of article 134. Accordingly, the court construed the drafter's intent to be that the accused's conduct was service discrediting because it violated state laws protecting minors.

Based upon its interpretation of Congress's intent, the court next rejected "any contention that a servicemember's conduct which transgresses state or foreign law is *per se* service discrediting."[125] Accordingly, if the government intends to rely upon the violation of state law as helping to establish that the conduct at issue was service discrediting,[126] it is incumbent upon the military judge to instruct on the charge with great particularity. Specifically, the judge must advise the court members unequivocally that the accused could not be found guilty of a violation of the general article solely because he had violated a state statute. The judge must also instruct that the statutory violation is but a circumstance to consider

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[109] Conduct Unbecoming an Officer and a Gentleman.

[110] United States v. Wright, 5 M.J. 106 (C.M.A. 1978).

[111] United States v. Canatelli, 5 M.J. 838 (A.C.M.R. 1978).

[112] United States v. Kline, 21 M.J. 366 (C.M.A. 1986).

[113] United States v. Picotte, 30 C.M.R. 196 (C.M.A. 1961).

[114] United States v. Sellars, 5 M.J. 814 (A.C.M.R. 1978).

[115] United States v. Fishel, 12 M.J. 602 (A.C.M.R. 1981).

[116] *See* United States v. Irvin, 21 M.J. 184 (C.M.A. 1985).

[117] United States v. Jones, 5 M.J. 579 (A.C.M.R. 1978).

[118] *See* MCM, 1984, Part IV, para. 60c(5)(b).

[119] United States v. French, 27 C.M.R. 245 (C.M.A. 1969).

[120] *Id.*

[121] *Sadler*, 29 M.J. at 372.

[122] The misconduct allegedly occurred at Kirtland Air Force Base, New Mexico. *Id.* at 371.

[123] *Id.* at 372.

[124] *Id.* at 374.

[125] *Id.*; *see* United States v. Grosso, 23 C.M.R. 30, 35-36 (C.M.A. 1957).

[126] The court effectively summarizes the arguments supporting and disputing this position in *Sadler*, 29 M.J. at 374-75. Although the court does not expressly adopt one of these positions at this point in its opinion, the later discussion indicates that it apparently accepts the proposition that a violation of state law can be some evidence that the accused's conduct was service discrediting.

in deciding whether the accused's conduct was service discrediting.[127] Finally, the judge is required to instruct upon the elements of the crimes prohibited by the state statute upon which the government relied.[128]

Besides these instructional omissions, the court found that the trial judge in *Sadler* inappropriately instructed the members as to several other matters. For example, the court noted that the judge erred when he instructed the members that they were permitted to reject a statutory provision that the judge had earlier judicially noted.[129] The court explained that

> if [the trial judge chooses] to place the language of the New Mexico statutes before the court members by means of prosecution exhibits [which he judicially noted], the military judge would have been well advised to repeat in his instructions the statutory language that he considered relevant and to have made clear to the court members that they were bound by his explanation of this language.[130]

The judge made a similar instructional error when he later referred to a prosecution exhibit containing a copy of the statute, rather than specifically mentioning the necessary statutory elements required by the statute.[131] The court observed, in this regard, that "we have no assurance that the members read that exhibit and thus were aware of this element of the offense."[132]

Finally, the court found that the judge erred when he instructed that any assumed ignorance by the accused as to the victim's true age was not a defense to the New Mexico statute. The court concluded:

> It does not necessarily follow, however, that an honest and reasonable mistake about age would be irrelevant to a determination of whether conduct was service-discrediting under Article 134. In other words, a factfinder might conclude that the circumstances leading to an accused's mistake about age were so understandable that the conduct simply did not bring discredit upon the armed forces—even though a state law was violated.[133]

Because of all of these instructional errors and omissions in *Sadler*, the accused's conviction for these two offenses were set aside and dismissed.

Conclusion

As noted at the outset, article 134 is a unique statutory provision that provides unparalleled flexibility in punishing misconduct not specifically proscribed by the Uniform Code of Military Justice. As the *Sadler* case clearly illustrates, trials for violations of the general article require that all the trial participants be especially attentive. The trial counsel must be certain as to the specific theory or theories of prosecution relied upon and the distinct requirements of proof for each. The defense counsel must be alert to ensure that the evidence presented by the government is limited to and relevant to the theory or theories alleged. Finally, both counsel—and especially the military judge—must take care that the members are instructed appropriately and with great specificity. MAJ Milhizer.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally-published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; submissions should be sent to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

1990 Army Chief of Staff's Legal Assistance Award For Excellence

OTJAG has announced the 1990 winners of the Army Chief of Staff's Legal Assistance Award for Excellence. Forty-seven legal assistance offices were nominated by their commanding generals, and twenty-eight were recognized for programs of excellence. Compared to 1989, this year saw nine more offices compete for the award (an increase in participation of twenty-four percent).

Congratulations are in order for all the following legal assistance offices for their exemplary legal assistance programs. Special recognition is due the 25th Infantry Division (Light), which was judged to have the best legal assistance office in the Army.

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[127] *Id.* at 375.

[128] *Id.* at 375-76.

[129] *Id.* at 377 (citing United States v. Williams, 17 M.J. 205, 215 (C.M.A. 1984) and United States v. Mead, 16 M.J. 270 (C.M.A. 1983)).

[130] *Sadler*, 29 M.J. at 377.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 377-78. Note that under military law, even an honest and reasonable mistake of fact as to the victim's age is not a defense to a carnal knowledge charge under UCMJ article 120(b). *See* MCM, 1984, Part IV, para. 45c(2).

25th Infantry Division (Light), Schofield Barracks, HI
I Corps, Fort Lewis, WA
XVIII Airborne Corps, Fort Bragg, NC
Fort Monmouth, NJ
Fort Leonard Wood, MO
8th Infantry Division, FRG
3rd Infantry Division, FRG
Fort Sill, OK
Munich Branch Office, VII Corps, FRG
32d AADCOM, FRG
V Corps, FRG
Fort Bliss, TX
U.S. Army Berlin
101st Airborne Division (Airmobile), Fort Campbell, KY
Fort Benjamin Harrison, IN
Fort Huachuca, AZ
6th Infantry Division, Fort Wainwright, AK
Vint Hill Farms, VA
82d Airborne Division, Fort Bragg, NC
5th Infantry Division, Fort Polk, LA
VII Corps, FRG
Wiesbaden Branch Office, V Corps, FRG
North Stuttgart Branch Office, VII Corps, FRG
24th Infantry Division, Fort Stewart, GA
Fort Lee, VA
2d Armored Division, Fort Hood, TX
10th Infantry Division, Fort Drum, NY
III Corps, Fort Hood, TX

LTC Hansen, OTJAG, and LTC Guilford.

Digest of Opinion of The Judge Advocate General

Applicability of Retirement Law to ROTC and USMA Cadets DAJA-AL 1989/2609 (27-1a), 8 December 1989

Judge advocates and civilian legal assistance attorneys should be aware of a recent opinion of the Administrative Law Division, OTJAG, that addresses the issue of which retirement law applies to former ROTC and USMA cadets now serving on active duty.

There have been a number of changes to the retirement laws in recent years that significantly affect the amount of military retirement pay an individual will receive. The starting point is the "old" retirement provision, found at 10 U.S.C. § 1406. Under this scheme, the amount of retired pay for those who first became members of a uniformed service before September 8, 1980, is calculated by using the full base pay for the member's retirement pay grade and a length-of-service multiplier. The multiplier is two-and-one-half percent for each year of creditable service. For twenty years of active duty, this usually means that the retiree receives fifty percent of the active duty base pay he or she is receiving as of the date of retirement.[134]

The first major change to this arrangement was effected by enactment of 10 U.S.C. § 1407. Under this change, the retired pay for a soldier who first became a member of a uniformed service after September 7, 1980, is calculated somewhat differently. The same length-of-service multiplier is used (i.e., two-and-one-half percent per year of service), but it is applied to a different base-pay amount. For retirement pay purposes, the "base pay" is the average of the individual's active duty base pay for the thirty-six-month period of service that yields the highest average. Generally, this means that the multiplier is applied to the average monthly base pay during the soldier's last three years on active duty. In most cases, this will reduce the amount of retired pay because the average will be less than the base pay on the date of retirement. For twenty years of active duty service, a retiree who first entered a uniformed service after September 7, 1980 (but before August 1, 1986—see the next paragraph) will receive fifty percent of the high thirty-six-month average of his or her active duty base pay.

The second change is found in 10 U.S.C. § 1409. It uses the same base pay figure found in section 1407 (i.e., the high thirty-six-month average), but the multiplier is changed. For those who first became a member of a uniformed service after July 31, 1986, retired pay is calculated by multiplying two-and-one-half percent times the number of years of creditable service and then reducing this product by one percentage point for each year of service less than thirty years. For twenty years of active duty service, this yields forty percent of the retiree's high thirty-six-month average active duty base pay.[135]

While the new calculations for retired pay are fairly straightforward, the retirement statutes are unclear as to whether ROTC and USMA cadets are "members" of a uniformed service and therefore grandfathered into the retirement law scheme that existed on the date they became cadets. After reviewing the definition of who is a "member"[136] and the legislative history of all the retirement statutes, OTJAG has addressed the issue of the applicability of these changes to cadets.

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[134] A different result occurs if the member has not held a pay grade on active duty for a sufficient time to retire in that pay grade. For example, an officer who has only one year in grade as an 05 cannot retire as an 05; he or she will have a retirement pay grade of 04.

[135] The percentage point reductions are restored when the retiree reaches the age of 62. 10 U.S.C. 1410 (Supp. V 1987). Thus, in this case, the retiree would begin receiving a full 50% of his or her high-36 average upon reaching age 62.

[136] 10 U.S.C. § 1411 (1988).

In DAJA-AL 1989/2609, OTJAG opined that although service as a cadet does not count toward retirement, some cadets nevertheless will be allowed to retire under the retirement law that was in effect on the date they became cadets. The specific retirement rules from the OTJAG opinion are as follows.

The provisions of 10 U.S.C. § 1409 (i.e., forty percent of thirty-six-month average base pay after twenty years of service) apply to those persons appointed as USMA cadets after July 31, 1986; the retirement pay of those who were appointed earlier is not subject to the reduced multiplier (i.e, the reduction for service less than thirty years). ROTC-commissioned officers also escape the reduced multiplier if they were Senior ROTC (SROTC) scholarship cadets or advanced course cadets who first enlisted in a reserve component before August 1, 1986. Section 1409 does apply, however, to SROTC and scholarship cadets who first enlisted after July 31, 1986 and to all other ROTC cadets (i.e., those who were only members of the ROTC program and did not enlist or otherwise incur a commitment to the military before August 1, 1986).

The provisions of 10 U.S.C. § 1407 (high thirty-six-month average base pay) apply to USMA cadets who were appointed after September 7, 1980 (but before August 1, 1986). They also apply to SROTC scholarship and advanced course ROTC cadets who first enlisted in a reserve component after September 7, 1980 (but before August 1, 1986).

Cadets who were appointed or who first enlisted as described above before September 8, 1980, are grandfathered under the provisions of 10 U.S.C. § 1406. This means that after twenty years of service, they receive fifty percent of the full active duty base pay for their retirement pay grade.

Questions on these matters should be directed to Major Tesdahl or Major Wagner of the Military Personnel Law Branch, Administrative and Civil Law Division, OTJAG. LTC Guilford.

Estate Planning Notes

Self-Proving Affidavit Saves Improperly Executed Will

Including a properly completed self-proving affidavit in a will may provide an unintended benefit according to a recent Delaware opinion. The court held that a self-proving affidavit attached to a will cured several technical mistakes in the execution of the instrument, including the fact that the testator failed to sign the will.

In *Matter of Will of Carter*[137] the testator, Carter, invited several friends and a notary public to his house to witness the execution of a new will. The notary had not previously notarized a will and was not familiar with the formalities required for proper execution. The notary public mistakenly signed on the line intended for Carter and affixed her notarial seal. The witnesses signed on the lines intended for their signature at the conclusion of the will. Carter did not sign on the line intended for his signature nor anywhere else in the will. Carter, the witnesses, and the notary all signed the self-proving affidavit in the proper places.

Several weeks after the will execution, Carter executed a codicil to his will. Again, the notary mistakenly signed and affixed her seal on the line intended for the Carter's signature. All the parties, however, signed the self-proving affidavit in the appropriate places.

After Carter's death, the Register of Wills rejected the will and codicil for failure to comply with Delaware law. The principal beneficiary under the instruments filed exceptions to the Register's action.

The Delaware court noted that the weight of authority is that a properly executed self-proving clause can validate an improperly executed will.[138] The court observed that the self-proving clause was stapled to the will and was at all times attached to it. Accordingly, it was possible to consider the self-proving affidavit as part of the will under the doctrine of integration. Viewing the documents as integrated, the court found that the testator's signature on the self-proving clause constituted substantial compliance with statutory requirements and upheld the will.

The result reached in *Carter* is good news for legal assistance practitioners and is another compelling reason for including self-proving affidavits in all wills. Practitioners should not, however, rely on *Carter* to become lax or modify will execution procedures. The court in *Carter* intimated that it might reach a contrary result if there was any evidence that the documents did not actually reflect the testator's actual intent. It is also unlikely that the court would have reached the same result had there been several irregularities in the execution of the will.

Perhaps the best reason for adhering to strict control of execution procedures is that some courts have not been as forgiving as the court in *Carter*. These courts take the view that clear evidence of intent cannot abrogate the mandatory provisions of state law and have held that self-proving affidavits can not validate improperly executed wills.[139]

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[137] 565 A.2d 933 (Del. Super. Ct. 1989).

[138] *Id.* at 935 (citing *In re* Estate of Petty, 227 Kan. 697, 608 P.2d 987 (1980)); *In re* Estate of Charry, 359 So.2d 544 (Fla. Dist. Ct. App. 1978); *In re* Estate of Cutsinger, 445 P.2d 778 (Okla. 1968).

[139] *See, e.g.*, Orrell v. Cochran, 695 S.W.2d 552 (Tex. 1985); *In re* Estate of Sample, 175 Mont. 93, 572 P.2d 1232 (1977); Boren v. Boren, 402 S.W.2d 728 (Tex. 1966).

To avoid the kind of mistakes committed by the notary in *Carter*, The Judge Advocate General has directed that attorneys supervise will executions and review executed wills after all parties have signed.[140] Virtually all will execution mistakes should be eliminated by complying with this policy and following will execution standard operating procedures. MAJ Ingold.

Will Ineffective To Change Joint Bank Account Beneficiary

In a decision characterized as being of "great importance to the citizens of this state, as well as banking and commercial institutions," the Supreme Court of Mississippi held that a will is not effective to change the beneficiary designation on a joint bank account.[141]

The facts in *Re Will and Estate of Strange* were not in dispute. Ernest Strange, a lawyer, opened up a joint account with Merrill Lynch in his name and the name of his son. Nine months later, Strange executed a will leaving a one-third share each of all savings accounts and all investments held in his name to his third wife and to his daughter and son by his first marriage. The Merrill Lynch account was the only funded account at the time of Strange's death. Strange's wife, serving as executrix of his estate, petitioned the court for an order that the proceeds from the Merrill Lynch account be paid into the estate.

The lower court ruled that the joint account with right of survivorship was void because it did not meet the criteria for a valid inter vivos gift.[142] Specifically, the court ruled that there was not a valid gift because there was no delivery and acceptance of the gift and the gift was not irrevocable. The court determined that an implied trust had been completed with the decedent's son acting as trustee.

The Mississippi Supreme Court reversed the lower court decision, finding that the requisites for completing a valid gift do not necessarily apply to joint bank accounts. The court noted that "[c]haos would result in banking, commerce and financing" if the lower court decision was affirmed.[143]

The court chose to follow the majority view that a joint account passes to the survivor upon the death of a joint tenant. Unlike a tenancy in common, the decedent's interest in the joint account vests immediately in the other joint tenant upon death.

Joint tenancies may be an extremely useful estate planning device in some situations. The use of joint tenancies however, should be carefully considered in every case.

Joint tenancies are viewed as one of the simplest ways to avoid probate. The probate avoidance advantage of joint tenancies, however, applies only on the death of the first tenant. Unless the survivor makes other arrangements, the entire joint property will be included in the survivor's probate estate.

Another major disadvantage of joint tenancies, suggested by the facts in *Strange*, is that many people open up joint accounts as a matter of convenience and have no intention to make a valid testamentary gift. All too frequently, these individuals do not realize that by creating a joint tenancy they have given up their right to testamentary disposition.

Creation of a joint tenancy may also be disadvantageous from a tax standpoint. The creation of a joint tenancy may give rise to a taxable gift.[144] Moreover, under federal estate tax rules the value of the entire joint property held by parties who are not married will be included in the gross estate of the person who furnished consideration for the asset.[145] The presumption that the decedent provided the consideration for the joint tenancy may be difficult to overcome in some cases.

Legal assistance attorneys should discuss the basic characteristics of joint tenancies with their estate planning clients. If a sizeable estate is involved, the attorney should also address the tax implications of using joint tenancies. MAJ Ingold.

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[140] Policy Letter, Subject: Will Preparation and Execution, dated 21 February 1986.

[141] *In re* Will and Estate of Strange, 548 So.2d 1323, 1325 (Miss. 1989).

[142] The lower court relied on Carter v. State Mutual Federal Savings & Loan Association, 498 So. 2d 324 (Miss. 1986), which sets forth the criteria for a valid inter vivos gift. According to this decision the requirements for a valid gift are: the donor must be competent, there must be a free and voluntary act by the donor, the gift must be complete, there must be delivery by the donor and acceptance by the donee, and the gift must be gratuitous and irrevocable.

[143] *In re* Will and Estate of Strange, 548 So.2d 1323, 1326 (Miss. 1989).

[144] I.R.C. § 2511 (West Supp. 1989); Treas. Reg. 25.2511-1(h). The general rule is subject to several exceptions. First, creation of a joint tenancy under $10,000 will not be subject to tax because the code permits a $10,000 annual gift tax exclusion. I.R.C. 2523(d) (West Supp. 1989). Secondly, creation of a joint tenancy with a spouse will not be subject to gift tax because there is an unlimited marital deduction. I.R.C. § 2523(a) (West Supp. 1989). Finally, there is no gift when a joint bank account is opened by only one of the parties and only that party continues to make contributions to the account.

[145] I.R.C. § 2040(a) (West Supp. 1989). An exception to this rule applies if the joint tenancy is created between spouses. Under the exception, property held by husband and wife as joint tenants is treated as owned one half by each regardless of actual contributions. I.R.C. § 2040(b)(2) (West Supp. 1989).

Professional Responsibility Note

Illinois and District of Columbia Adopt New Ethics Rules

Two more jurisdictions, Illinois and the District of Columbia, have adopted new ethics rules based on the Model Rules of Professional Conduct.

The Illinois Supreme Court adopted new ethics rules that will take effect on August 1, 1990.[146] The new rules, while following the structure of the ABA Model Rules of Professional Conduct, include many provisions from the Former Model Code of Professional Responsibility. Illinois follows California and North Carolina in adopting new rules that combine the substance of both the Model Rules and the Model Code into one new standard.

The preamble to the Illinois rules is completely different than the preamble to the Model Rules. The Illinois rules also do not contain the comments found after each of the Model Rules.[147] Illinois also omits several important Model Rules, including Model Rule 2.2, Intermediary, Model Rule 3.9, Advocate in Nonadjudicative Proceedings, and Model Rule 6.1 regarding pro bono and public service.[148]

Illinois adds several provisions to Model Rule 1.1 regarding competency. Illinois requires a lawyer who is not competent in a particular matter to withdraw from the representation or associate with another lawyer who will provide competent representation. The Model Rule version of 1.1 mandates that lawyers provide competent representation and does not recognize the possibility of furnishing this representation by associating with another counsel. Illinois adds another provision to its Rule 1.1 requiring a client's consent if a lawyer delegates responsibility for the clients matter to another attorney. No similar requirement is contained in the Army Rules.

Illinois adds a provision to Rule 1.2 requiring a lawyer who knows that a client has perpetrated a fraud during the course of representation to take steps to convince the client to rectify the fraud and, if the client refuses, report the fraud to the court or the affected person. The requirement to report is diluted, however, because there is no obligation to report privileged information. The Illinois rules also require lawyers to report fraud committed by third parties to a tribunal.

Like Army Rule 1.6, the Illinois rule on confidentiality mandates disclosure of information about a client necessary to prevent the client from committing an act likely to result in substantial bodily harm or imminent death.[149] Illinois, however, retains a provision from the Model Code giving attorneys the discretion to reveal privileged information to prevent the client from committing any future criminal act. The Army Rule and the version of the rule in many states do not give lawyers the complete discretion to release information involving a client's intention to commit any future criminal act.

Illinois modifies several rules regarding conflicts of interest and payment of fees. The Illinois version of Model Rule 1.8 will prohibit lawyers from entering into business transactions with a client if the lawyer knows that there may be a conflict of interest between the business interests and the attorney-client relationship. Illinois Rule 1.8 also prohibits attorneys from entering into agreements with clients that limit a client's right to file a disciplinary complaint or settle claims without first advising the client to seek independent legal advice. Illinois omits Model Rule provisions limiting the acceptance of compensation from third parties and the provision regarding disqualification among lawyers related to each other as parent, child, spouse, or sibling.[150]

The Illinois version of Model Rule 1.10, addressing imputed disqualification, has also been modified. Under the Illinois version, a law firm will not be disqualified from accepting a case if a new lawyer joins the firm and came from a firm that represented a party whose interests were adverse to the lawyer's new firm so long as the lawyer has no material confidential information and is screened from all participation in the matter. Illinois also sets out an extensive screening procedure for former non-government and government lawyers designed to isolate the new attorney from any direct involvement in a matter in which they were previously involved for a different firm or the government.

Illinois has adopted Model Rule 3.3 requiring candor toward a tribunal without modification, but it also adds eleven additional prohibitions. The new prohibitions bar, among other things, paying a witness compensation depending on the outcome of a case, advising a witness to become unavailable in a case, suppressing evidence,

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[146] ABA/BNA Lawyers' Manual On Professional Conduct.

[147] Most states have included the comments. The Army Rules of Professional Conduct for Lawyers also include most of the comments from the Model Rules with appropriate modifications for military practice. Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers (31 Dec. 1987) [hereinafter Army Rules]. Neither the Navy nor the Air Force have included comments in their new ethics rules.

[148] Model Rules 2.2, Intermediary, and Model Rule 3.9, Advocate in Nonadjudicative Proceedings, are contained in the Army Rules. The omission of Rule 6.1 in the Illinois rules does not conflict with the Army Rules because the Army Rules completely omit chapter 6.

[149] Army Rule 1.6, however, contains an additional mandatory reporting requirement when the information is necessary to prevent the client from committing a criminal act which is likely to result in the "significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system." Army Rule 1.6(b).

[150] Model Rules 1.8(f) and 1.8(i).

refusing to accede to reasonable requests of opposing counsel, assisting a client in illegal or fraudulent conduct, and fabricating false evidence.

The Illinois rules completely replace Model Rule 3.5 dealing with impartiality and decorum of the tribunal with a new version. The Illinois rules require attorneys to reveal improper conduct by jury members. The rule also prohibits attorneys from conducting vexatious or harassing investigations of jury members and bars attorneys from lending or giving anything of value to a judge or employee of a tribunal.

Illinois Rule 3.6 slightly modifies the Model Rules regarding extrajudicial statements to prohibit statements that pose a "serious or imminent threat to the fairness of the adjudicative process." The Illinois rules omit several of the duties imposed on prosecutors under Model Rule 8.3. Illinois eliminates the duty of a prosecutor to take reasonable efforts to advise an accused of the right to counsel and to refrain from seeking a waiver of pretrial rights from an unrepresented accused.

Illinois modifies the duty of a lawyer to report misconduct in its version of Rule 8.3. Illinois requires lawyers to report a criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer as well as any conduct involving dishonesty, fraud, deceit, or misrepresentation. The Model Rules and the Army Rules, on the other hand, mandate reporting another lawyer's violation of the rules if it raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness to practice law.

The Illinois version of 8.3 contains a novel provision requiring Illinois attorneys to report any disciplinary action brought before any other body than the Illinois Disciplinary Commission to the Commission. Judge advocates licensed in Illinois should note the requirement under Army Regulation[151] to notify the Executive prior to filing a required report to the state bar disciplinary committee.

The District of Columbia new rules will go into effect on January 1, 1991. Like the Illinois rules, the new D.C. rules follow the format of the Model Rules but contain several significant changes.

The most novel and controversial provision of the D.C. rules is a rule permitting non-lawyers to become law firm partners.[152] The District is the first jurisdiction to permit nonlawyer partners to share fees and management decisions with lawyers.

The District rules state that a violation of the ethics rules may be relevant to liability in a claim "only to a client of the lawyer who commits the violation."[153] The scope provision of both the Model Rules and the Army Rules of Professional Conduct, on the other hand, provide that a violation of the rules does not give rise to a cause of action against the attorney.

The District rules contain several substantial modifications to Model Rule 1.6 addressing confidentiality. The D.C. rules permit attorneys to reveal confidential information when necessary to prevent bribery, intimidation of witnesses, jurors, or other court officials. Another provision requires attorneys to exercise reasonable care to ensure that subordinates do not reveal confidential information.

The District of Columbia has modified several of the Model Rules regarding conflicts of interest. The general conflicts of interest rule, Rule 1.7, has been rewritten to provide greater specificity to counsel as to when a lawyer may not undertake representation of a client. Like the Model Rules, the D.C. version of the rule allows an attorney to undertake representation of potentially affected clients if they are informed about the potential for conflict and provide consent. The District rules also modify Model Rule 1.8(i), regarding prohibited transactions, Model Rule 1.9, concerning conflicts of interest with a former client, and Model Rule 1.10 setting forth the imputed disqualification standard.

The rule setting forth the attorney's response to perjury by the client, Rule 3.3(b), has also been changed in the D.C. rules. The District rules approach is to require the attorney to make a good faith effort to dissuade the client from giving evidence, and if unable to do so, seek to withdraw. A lawyer is allowed if these measures are unsuccessful to put the client on the stand to testify in a narrative fashion. The attorney may not examine the witness or argue the value of the perjured testimony. Neither the Model Rules nor the Army Rules permit the attorney who knows that a client will commit perjury to put the client on the stand for a narrative statement.

The District rules contain a rule with no counterpart in the Model Rules, which prohibits discrimination on the basis of race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap.

Several of the new District rules seek to accommodate the special ethical responsibilities of government lawyers. The District rule on communications between the lawyer and opposing parties, Rule 4.2, permits a lawyer to communicate about a matter with a non-party employee of the opposing party without the consent of the opposing party's lawyer. The lawyer engaging in the

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[151] Army Reg. 27-1, Legal Services-Judge Advocate Legal Services, para. 7-6c(2) (15 Sept. 1989).

[152] D.C. Rule 5.4.

[153] D.C. Rules, Scope.

communications must, however, inform the third party that the lawyer represents a party adverse to the person's employer. The new district rules also permit ex-parte communications between lawyers and opposing government officials who have the authority to redress the grievances of the lawyer's client. The comment to the district rules also notes that a defendant in a criminal case may seek to communicate with prosecutors. Although communications between represented defendants and prosecutors without notice to counsel are not prohibited under the rule, they will be viewed with suspicion.

Several changes in the district's rules will affect civilian attorneys. The modification of rule 1.5 concerning fees, for example, permits contingent fees in domestic cases. The district's ethical rules also permit attorneys to pay individuals for referring work to them. The District's rule regarding advertising, Rule 1.7, substantially reorganizes the Model Rule version.

Legal assistance attorneys licensed in either Illinois or the District of Columbia should become familiar with the new ethical standards adopted by those jurisdictions before they become effective. Army judge advocates licensed in these jurisdictions will be required to comply with the new standards. To the extent that any of the rules are inconsistent with the Army Rules, however, judge advocates must comply with the Army Rules.[154] MAJ Ingold.

Consumer Law Note

Mail Order Shopping

The Federal Trade Commission (FTC) has a mail order shopping rule[155] that is designed to protect consumers who shop by mail. This rule establishes the following requirements for merchants who provide goods through the mail:

1) Companies offering mail order purchases must send ordered goods within the time promised in their ads, or within thirty days if no shipping time is stated. The time begins to run at the time the company receives the order, including the consumer's cash, money order, or charge account number.

2) If the company cannot ship within the required time, it must notify the consumer and provide the option of a refund or agreeing to a delay. The company must give the new shipping date and instructions on cancelling the order.

3) If a company cannot ship on time and fails to notify consumers as required by the FTC rule, it must deem the order cancelled and provide a full refund.

4) The company must refund the consumer's money within seven business days, or credit the consumer's account within one billing cycle for a credit card order, after receiving the consumer's cancellation order.

Unfortunately, the mail order rule does not apply to all goods and services that consumers order by mail. Exceptions to the rule include photo-finishing services, magazine subscriptions after the first issue, cash on delivery orders, seeds, and plants. Although the rule does not apply to orders by telephone, the FTC has commenced a rulemaking procedure to expand the coverage to include merchandise ordered by telephone.[156]

The FTC has recently published advice to consumers who shop by mail.[157] The FTC recommends that mail order shoppers take certain precautionary steps to protect themselves from fraud. For legal assistance attorneys, this advice is appropriate for inclusion in preventive law articles published in installation newspapers and bulletins. The advice includes the following guidance:

1) Do not wait until the last minute to order by mail, particularly during any holiday season.

2) Know the merchant's policy on returning goods ordered by mail. Telephone the seller if advertisements do not provide sufficient information.

3) Read product descriptions carefully and do not rely on pictures of the product.

4) If a company's reputation is not established, check with the local Better Business Bureau or state or local consumer protection offices.

5) Always keep a copy of the company's name, address, and telephone number, as well as a record of the date of the order, and the ad or catalog from which the order was made.

6) Keep cancelled checks and charge account records.

7) Use company toll-free numbers to make shopping easier and less expensive.

The mail order rule is a little known FTC requirement that, when finally amended to include telephone sales, can be a valuable asset in the legal assistance attorney's consumer law arsenal. Legal assistance attorneys should invoke it when necessary, and use it in conjunction with

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[154] Army Rule 8.5.

[155] 45 C.F.R Part 435 (1989).

[156] *See* 54 Fed. Reg. 49,060 (1989) (FTC request for public comment on proposed rule amendment).

[157] *Report Bulletin No. 15*, Consumer and Commercial Credit 1, 2 (Jan. 8, 1990) (discussing FTC advice concerning mail order fraud).

any state laws and regulations applicable to mail order situations. MAJ Pottorff.

Administrative and Civil Law Note

Hospital Law Note

A New Quality Assurance Regulation

The Army Medical Department has recently published its new quality assurance regulation. This regulation, AR 40-68, *Quality Assurance Administration*,[158] supersedes chapters 9 and 10 of AR 40-66, *Medical Record and Quality Assurance Administration*.[159] The new regulation contains a number of significant procedural and substantive changes that will affect judge advocates advising health care providers and medical treatment facility commanders. Several of the more important changes dealing with credentialing and privileging actions for health care providers are synopsized below. A more comprehensive discussion of these and other changes will appear in a subsequent issue of *The Army Lawyer*.

Credentialing and Privileging Actions

Similar to AR 40-66, the new regulation lists several types of actions that affect a health care provider's privileges to practice medicine in a treatment facility. Commanders may take these actions after documenting a practitioner's performances. Included are privilege reappraisal, abeyance, augmentation, suspension, restriction, and revocation.[160] Of these, abeyance is the most significant new development. It is "the temporary assignment of a practitioner to nonclinical duties while an internal or external peer review is conducted."[161] Because such an action is not an adverse action as it pertains to privileges, commanders need not send a report to the National Practitioner Data Bank[162] discussing the credentialing action. This enables commanders to preserve practitioners' Data Bank records when the commanders are uncertain whether adverse entries will be necessary. The regulation limits abeyance to twenty-eight days, but commanders may request additional thirty-day extensions in unusual cases.[163]

Hearing Rights

AR 40-68 requires a quorum before the credentials committee may recommend action to the commander regarding a practitioner's privileges. The regulation defines a quorum as fifty percent of the credentials committee, plus one.[164] Similar to the earlier provision in AR 40-66, the new regulation indicates that the commander may select a hearing committee to review a practitioner's credentials. Unlike AR 40-66, which required a minimum of three members on the hearing committee, AR 40-68 is silent as to the hearing committee's numerical composition. It provides, however, that the credentials committee may act as the hearing committee.[165] Like the earlier regulation, which required that the hearing committee include at least one member of the practitioner's specialty, AR 40-68 provides that a member of "the practitioner's discipline" should be present.[166]

AR 40-68 does not give military health care providers the right to military counsel in a credentials hearing, and civilian counsel hired at a practitioner's own expense may not take an active role in the proceedings. In this respect, the regulation has not been changed. The regulation does, however, provide limited representation for civilian health care providers. The exclusive representative of an appropriate bargaining unit has the right to be present if a civilian employee is the subject or witness during proceedings and the employee reasonably believes disciplinary action could result.[167] While the regulation indicates the representative's role will not be "wholly passive," it also directs that the representative will "not be permitted to make the proceedings adversarial."[168]

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[158] Army Reg. No. 40-68, Medical Services: Quality Assurance Administration (20 Dec. 1989) [hereinafter AR 40-68].

[159] Army Reg. No. 40-66, Medical Services: Medical Record and Quality Assurance Administration (31 Jan. 1985).

[160] AR 40-68, para. 4-2b.

[161] *Id.*

[162] *See* AR 40-68, para. 4-13, which implements reporting requirements for the National Practitioner Data Bank, created by the Health Care Quality Improvement Act of 1986, Pub. L. No. 99-660, —— Stat. ——, codified at 42 U.S.C. § 11101, 11111-11152.

[163] Message 021304Z Aug. 89, subject: Quality Assurance; message 261400Z Dec. 89, subject: Change to message 021340Z Aug. 89.

[164] AR 40-68, para. 2-1b.

[165] *Id.* at para. 4-9f(9).

[166] *Id.*

[167] *Id.* at para. 4-9f(4). The drafters added this provision in response to a recent case in which a hospital commander refused to allow union representation of a civilian physician during a credentials hearing. American Federation of Government Employees v. Federal Labor Relations Authority, 837 F.2d 495 (D.C. Cir. 1988) (physician was entitled to union representation at his credentials hearing).

[168] AR 40-68, para. 4-9f(4).

Summary Action

AR 40-68 also changed provisions dealing with summary action taken to limit, suspend, or revoke a health care provider's privileges. The regulation now refers to summary action as an abeyance,[169] presumably to avoid reporting the action to the National Practitioner Data Bank. Summary action is taken by the commander or the chairperson of the credentials committee.[170] It details the practitioner to nonclinical duties pending follow-up investigation. In addition to the purpose of protecting the health or safety of patients, employees, or others, AR 40-68 also directs summary action when a practitioner has been involved in an incident of gross negligence or acts of incompetence or negligence causing death or serious bodily injury. When there is immediate threat to the welfare of a patient, the chief of the practitioner's department or service has authority to exercise summary action. If the practitioner is inebriated or exhibiting bizarre behavior, the senior medical officer available may act summarily.[171]

AR 40-68 also requires an immediate quality assurance investigation following summary action.[172] The chairperson of the credentials committee will appoint an officer to conduct an informal investigation and provide a report to the credentials committee. The regulation recommends that the chairperson arrange the participation of a recognized, unaffiliated civilian specialist in order to maximize objectivity. The credentials committee will review the investigation and make recommendations concerning the practitioner's privileges. If the credentials committee recommends restriction of privileges, the practitioner is entitled to additional rights, including a hearing.[173]

National Practitioner Data Bank

AR 40-68 implements the Army's participation in the National Practitioner Data Bank. Although the Bank, which will be maintained by the Department of Health and Human Services,[174] is not yet operational, the regulation requires reports now. Commanders must submit reports in two instances. The first is when the local claims judge advocate notifies the risk manager that a claimant has received a monetary award through either settlement or litigation.[175] The second is when a privileging action adversely affects the clinical privileges of a practitioner. The commander must submit the report when the individual chooses not to appeal, appellate authorities complete their review, or the individual is separated from service, whichever is first.[176] Reports to the National Practitioner Data Bank are sent through medical channels. The regulation directs commanders of medical treatment facilities to submit reports through their next higher headquarters to The Surgeon General. MAJ Pottorff.

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[169] *Id.* para. 4-9b(1)(c).

[170] *Id.* para. 4-9b(1)(a).

[171] *Id.* para. 4-9b(1)(b).

[172] *Id.* para. 4-9b(3).

[173] *Id.*

[174] The Department of Health and Human Services published reporting criteria and procedures on 17 October 1989, but has not yet brought the Bank to operational status. *See* 54 Fed. Reg. 42,722 (1989) (to be codified at 45 C.F.R. Part 60).

[175] *Id.* para. 4-13b.

[176] *Id.* para. 4-13c.

Claims Report

United States Army Claims Service

Ethical Guideposts in Federal Tort Claims Practice

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Claims judge advocates and Department of the Army civilian attorneys involved in the investigation and resolution of claims under the Federal Tort Claims Act (FTCA), like all other lawyers, are governed by ethical precepts and mandates. This note will briefly review some general considerations in this area and will discuss questions of conflicts of interest and client disability.

General Considerations

An attorney's license is held subject to the issuing jurisdiction's finding of continuing fitness to practice law. Such fitness includes considerations of physical, mental, and ethical soundness. Therefore, an attorney should look to the jurisdiction issuing his or her license concerning

which set of rules of conduct and practice it has adopted. Over thirty state jurisdictions have promulgated rules closely resembling the American Bar Association Model Rules of Professional Conduct (ABA Rules). A few states still follow the ABA Model Code of Professional Responsibility (ABA Code), a precursor to the ABA Rules. Some states, deciding to adopt neither, have devised their own set of rules; one of these is California.

The Army has adopted its own set of rules in Department of the Army Pamphlet 27-26, entitled Rules of Professional Conduct for Lawyers (Army Rules), which is modeled after the ABA Rules. "The definitive interpretation, implementation, and enforcement of these Rules are the exclusive province of The Judge Advocate General."[1] They must, however, be considered in context with statutes and court rules relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general.[2] These rules apply to civilian lawyers practicing before courts-martial, judge advocates, and members of the Judge Advocate Legal Service.

The Comment to Army Rule 8.5, although not in itself authoritative, states that the Army Rules supersede any conflicting rules applicable in jurisdictions in which the lawyer may be licensed. What does the Army claims attorney do when faced with conflicting rules? This can be quite an interesting question, especially when one considers that many claims attorneys are licensed to practice law in multiple jurisdictions that have different standards on certain ethical issues.

A good first step would be to obtain written opinions from the ethics committees of the licensing jurisdictions involved. These memoranda can then be submitted with a request for official guidance through the claims attorney's supervisory chain to The Judge Advocate General (TJAG).

Ethics analysis can begin with the premise that the mandates of the Army Rules, ABA Rules, and ABA Code set forth minimum standards below which a lawyer would be subject to discipline. Both the Army Rules and ABA Rules, in their respective scope statements, advise that "[the rules] do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. These Rules simply provide a framework for the ethical practice of law."[3] The Preamble to the ABA Code mirrors this guidance.

FTCA Examples

Numerous ethical issues can arise during the investigation and resolution of FTCA claims. One type of ethical issue that arises involves conflicts of interest.

For example, a civilian attorney timely files claims in the amounts of $200,000 each for two civilians, a driver and his passenger, as the result of an automobile accident involving an Army driver. Investigation reveals that the civilian driver was clearly over fifty percent contributorily negligent. The Army claims attorney estimates the upper range of losses and injuries suffered to be $25,000 and $35,000 for the driver and passenger, respectively. Research shows that the jurisdiction of the accident situs follows a forty-nine to fifty-one percent comparative negligence rule and provides for joint and several liability and contribution among tortfeasors. After some negotiation, in which the comparative negligence is discussed, the civilian attorney offers to settle the claims for a total of $50,000, to be split evenly between the two clients. Although the civilian attorney is not governed by the Army Rules, he will be bound by conflict of interests rules adopted by his licensing jurisdiction.

Here, the Army claims attorney is placed in an awkward position. Should he or she proceed in the face of a possible ethics violation? How does this affect the course of negotiations? When confronted with such a situation, it is not uncommon for the claimants' attorney to state that he or she fails to see any ethical problem. Is the attorney negotiating in the best interests of each client? Is he or she operating with the clients' informed consent?

As a claims attorney, you might wonder why you should be concerned. By not inquiring into the apparent impropriety, would you be joining in it? Would the resulting settlement be tainted? The comment to Rule 1.7 indicates that opposing counsel may properly raise the question of conflict of interest in situations where the conflict clearly calls in to question the fair or efficient administration of justice. Reference to the rule, however, is not to be invoked as a procedural weapon.[4] One approach would be to send a letter to the claimants' attorney requesting his or her written assurance that both clients agree to continued representation by that attorney, even after the ramifications of the apparent conflict of interest have been explained to both clients. In most cases, the claimants' attorney will comply. Assuming noncompliance and a determination that such noncompliance raises a substantial question as to that attorney's honesty, trustworthiness, or fitness as a lawyer, the Comment to Army Rule 8.3 instructs that a report

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[1] Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers, Preamble (31 Dec. 1987).

[2] *Id.*

[3] *Id.*

[4] *Id.*

should be made through the supervisory chain in accordance with regulations promulgated by TJAG.[5]

Questions of conflicts of interest can appear in more subtle forms. For example, during settlement negotiations of a medical malpractice claim, claimant's attorney makes a counteroffer to a proposed government structured settlement offer, seeking an increased up-front cash payment. He states that the increase is needed to satisfy his attorney's lien for work completed for the claimant several years ago on an unrelated matter. The claimant has a history of money management problems and hospitalization for mental disability.

Whose interest is claimant's attorney advancing? Is he more concerned with obtaining a fair settlement that will address the needs of the claimant or with collecting a bad debt? Issues raised in the car accident hypothetical apply equally as well here. These matters are accentuated given the claimant's questionable mental capacity.[6]

A few common sense steps should help resolve this situation. First, the factual issue of incapacity should be investigated thoroughly. Review of all medical records by competent medical experts is essential here. Second, procedural protections concerning the settlement of claims of incapacitated persons afforded by local law in claimant's jurisdiction should be researched. Proper use of these protections, such as the appointment of a guardian ad litem or conservator, represents prudent practice and generally advances the interests of all concerned as well as the integrity of the settlement. Finally, the claims attorney should write claimant's counsel requesting resolution of the issues of incapacity and apparent conflict of interest before settlement negotiations are continued.

Conclusion

Government lawyers charged with handling FTCA claims, like all other lawyers, are bound by rules of ethics. Although ethics questions vary in complexity and factual presentation, their resolution can be simplified by keeping in mind that consistently ethical conduct is the result of aspiring to meet our fiduciary duties to our client and fully discharge our duties to the legal system.

It is the responsibilities of TJAG and supervisory lawyers to "effect and ultimately enforce the Rules."[7] Consultation with these sources should be undertaken whenever ethical issues are encountered.

Claims Notes

Personnel Claims Notes

Conflict or Natural Disaster Claims

Following conflict—both hostilities and hostile actions short of war—or a natural disaster, claims personnel often perceive pressure from commanders, who are not familiar with the intent of the Personnel Claims Act, to pay claims inappropriately.

At such times, while every effort should be made to investigate and pay meritorious claims as quickly as possible, rules governing cognizable claims and determination of compensation are *not* relaxed; claims may still only be paid for substantiated losses of tangible personal property in accordance with chapter 11, AR 27-20, and chapter 2, DA Pamphlet 27-162. Emergency partial payments should be used extensively when appropriate, and USARCS should be contacted for specific guidance if questions arise.

Field claims offices will forward claims that are meritorious in an amount exceeding $25,000 to USARCS for payment. Field claims personnel will assist the claimant in obtaining substantiation and will *fully* adjudicate such claims prior to forwarding them. Pursuant to paragraph 11-17*c*, AR 27-20, claims personnel will contact USARCS telephonically and arrange for any emergency partial payment needed to alleviate hardship while this process occurs. Mr. Frezza and Ms. Zink.

Property Turned in by Claimants

Occasionally, the Claims Service hears of a claims office that is accepting property from a claimant and using it to furnish the claims office. This is a very improper way to dispose of property belonging to the government.

All property turned in for salvage to the government *must* be turned in to a Defense Reutilization and Marketing Office (DRMO). If, however, the claims office can demonstrate a need for particular items to furnish the claims office, some DRMO's will immediately issue items that have been turned in to the claims office on a proper hand receipt.

Claims personnel are reminded that the carrier has the right to pick up items on Increased Released Valuation shipments. For this reason, claimants should not be

[5] Army Reg. 27-1, Judge Advocate Legal Service, para. 7-6(a) (15 Sept. 1989) [hereinafter AR 27-1], provides that approval of The Judge Advocate General must be obtained before conducting any investigation of an alleged ethics violation of the Army Rules of Professional Conduct for Lawyers. Although the regulation does not address reporting procedures for possible ethical violations by attorneys not subject to the Army Rules of Professional Conduct for Lawyers, the most prudent course when faced with this situation would be to follow the guidelines outlined in Chapter 7 of AR 27-1.

[6] Rules 1.14(b) of the ABA Rules and the Army Rules state that "[a] lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest." These rules and Ethical Consideration 7-12 of the ABA Code address the heightened fiduciary responsibilities owed to a client operating under a disability.

[7] DA Pam 27-26, Comment Rule 5.1(a).

directed to turn items in to the DRMO on claims involving Increased Released Valuation, but should instead be advised to hold on to items in accordance with paragraphs 2-44b and 2-55a(8), DA Pam 27-162 (15 Dec. 1989). Mr. Frezza.

Personnel Claims Recovery Notes

Claims for Items Missing from Cartons

The following is the text of USARCS message 281600Z Feb. 90, which concerns claims for items missing from cartons:

"Subject: Letter to be Used by Claimant for Recovery Purposes

1. In order to meet the requirements of the GAO and therefore achieve effective recovery, it is mandatory that the member, who submits a claim for missing items from a carton, sign a separate statement which must be attached (stapled) to the DD Form 1842, Claim for Personal Property Against the United States (this statement is required even though a similar statement appears preprinted on the DD Form 1842, dated Dec 88). The statement should read as follows:

The following items were missing at delivery of my household goods. They were items I owned and used prior to the move but were not delivered at destination by the carrier. After my household goods were packed at origin, I checked all rooms in the house to make sure nothing had been left behind. All items had been packed by the carrier.

INV #	ITEM	INV #	ITEM
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

_____ _____
(signature of claimant) (date)
(or agent)

If the member has additional information (i.e., where the items were located in the house before packing, etc.), he/she should add that information in his/her own words to the required statement above.

2. Claims with missing items received at this Service dated after the date of this message that do not contain the required statement will be returned for correction.

3. A copy of the required statement must be included in the demand packet.

4. POC is Phyllis G. Schultz, Autovon 923-7789.

To effect recovery for items missing from cartons, claims offices must obtain statements from claimants for all files on hand as of 28 February 1990 that involve items missing from cartons. Claimants must separately list items. To the extent possible, claimants should be encouraged to use their own words, so long as all elements in the statement above are addressed. We believe that the statement and procedure required by the above message will suffice to uphold our offset actions in these claims. Mr. Frezza.

1989 Carrier Recovery Report

In fiscal year 1989, USARCS and Army field claims offices collected over $12.95 million in carrier recovery, an increase of over four million from the previous year. Recovery from carriers who damage or lose soldiers' property in shipment is vital, both to supplement claims appropriations and also to ensure that carriers provide quality service. While this increase in carrier recovery collected is primarily due to increased carrier liability on some types of shipments, it represents a tremendous amount of work by claims personnel.

The Judge Advocate General has recognized the top ten CONUS claims offices and the top eight OCONUS offices. Certificates of excellence were issued to the following offices:

1. CONUS Offices
   a. Sharpe Army Depot
   b. Yuma Proving Ground
   c. U.S. Army Field Artillery Center and Fort Sill
   d. Fitzsimons Army Medical Center
   e. U.S. Army Combined Arms Center and Fort Leavenworth
   f. 24th Infantry Division (MECH) and Fort Stewart
   g. U.S. Army Quartermaster Center and Fort Lee
   h. Headquarters, Fort Monroe
   i. U.S. Army Garrison, Fort McPherson
   j. 6th Infantry Division (LIGHT) and Fort Richardson
2. OCONUS Offices
   a. 2nd Armored Division (Forward) (Bremerhaven Branch)
   b. 21st Theater Army Area Command (Northern Law Center—Schinnen Branch)
   c. 21st Theater Army Area Command (Northern Law Center—Rheinberg Branch)
   d. 21st Theater Army Area Command (Northern Law Center—Brussels Branch)
   e. 21st Theater Army Area Command (Northern Law Center—Mons Branch)
   f. U.S. Army Western Command and Fort Shafter
   g. U.S. Army Garrison, Fort Buchanan
   h. U.S. Army, Japan (Okinawa Branch)

Certificates of excellence were awarded based on the amount recovered locally and the amount recovered by

USARCS on files prepared by each claims office as a percentage of the amount paid during the fiscal year. Roughly fifteen percent of the CONUS and OCONUS offices were recognized.

While we congratulate these eighteen offices for their achievements in FY 1989, we recognize that many of our offices performed in an exemplary manner, including a large number of offices whose recovery percentage was only a little lower than those offices that were awarded certificates of excellence. We appreciate the work that went into the carrier recovery program, and we thank our carrier recovery personnel for the job they did.

Affirmative Claims Note

1989 Medical Care and Property Damage Recovery Report

In calendar year 1989, over $12.2 million was collected in medical care and property damage recovery claims by field claims offices under the Army Affirmative Claims Program. This recovery effort contributed significantly to the overall success of this program.

The medical care recovery program is based upon statutory authority conferred by the Federal Medical Care Recovery Act, which enables the government to recover the reasonable value of medical care furnished by the United States to a person on account of injury or disease incurred under circumstances creating tort liability upon some third person. The property damage program is based on the authority found in the Federal Claims Collection Act, giving the government the right to compensation for damage caused to government property by a third party.

The Judge Advocate General has recognized the top ten CONUS claims offices with the highest medical care recovery and the top ten in property damage recovery. Certificates of excellence have been forwarded to the claims offices listed below:

1. Medical Care Recovery:
   a. Brooke Army Medical Center
   b. U.S. Army Armor Center and Fort Knox
   c. XVIII Airborne Corps and Fort Bragg
   d. 4th Infantry Division (MECH) and Fort Carson
   e. 1st Infantry Division (MECH) and Fort Riley
   f. I Corps and Fort Lewis
   g. III Corps and Fort Hood
   h. 101st Airborne Division (AASLT) and Fort Campbell
   i. U.S. Army Chemical and Military Police Centers and Fort McClellan
   j. U.S. Army Aviation Center and Fort Rucker
2. Property Damage Recovery
   a. 5th Infantry Division (MECH) and Fort Polk
   b. National Training Center and Fort Irwin
   c. U.S. Army Armor Center and Fort Knox
   d. U.S. Army Tank-Automotive Command
   e. III Corps and Fort Hood
   f. Presidio of San Francisco
   g. 1st Infantry Division (MECH) and Fort Riley
   h. XVIII Airborne Corps and Fort Bragg
   i. 4th Infantry Division (MECH) and Fort Carson
   j. 7th Infantry Division and Fort Ord

While all these offices are to be congratulated for their outstanding 1989 achievements, the total recovery effort depends on the dedication of every claims office, large and small, throughout the Army. To each of you who dedicated yourself to serving the Army and its soldiers in this Armywide effort, we send our thanks for a job well done!

Management Note

Applying the Program Fraud Civil Remedies Act to Claims Fraud

The Program Fraud Civil Remedies Act (PFCRA), implemented by Interim Change No. I01, AR 27-40 (27 Nov. 1989), and DOD Directive 5505.5, provides the government with an administrative mechanism to collect civil penalties up to $5,000 from persons who present false claims or claims that are supported by false statements. The PFCRA is intended to address claims fraud of all types, including procurement fraud and travel reimbursement fraud, without requiring the government to file a lawsuit in federal court. It can be used to collect from claimants who present fraudulent personnel or tort claims.

The Program Fraud Civil Remedies Act is *not* appropriate to use for minor instances of personnel or tort claims fraud that can be adequately resolved through other civil or criminal means; the Act's procedures for processing a case are quite complicated and are outlined in chapter 8 of AR 27-40. The Act is, however, another weapon for the government to use in egregious cases, particularly when the claimant is not an active duty soldier. Prior to attempting to use the Act to address personnel or tort claims fraud, claims offices are asked to contact Mr. Frezza at AV 923-3229 for personnel claims or Mr. Rouse at AV 923-7803 for tort claims. Cases are unlikely to be accepted for PFCRA action unless they are fully investigated and well documented. Mr. Frezza.

Labor and Employment Law Notes

OTJAG Labor and Employment Law Office,
FORSCOM Staff Judge Advocate's Office
and TJAGSA Administrative and Civil Law Division

Labor Law

FLRA Reviews Arbitration of Removal of Temporary Employee

In denying the union's exceptions to an arbitration award, the FLRA discussed its jurisdiction over those exceptions. The agency had removed grievant, an employee on a temporary appointment limited to one year, for AWOL. The arbitrator had found the grievance arbitrable and then denied it. FLRA noted that the grievant was not an employee under 5 U.S.C. § 7511 and therefore was not entitled to the adverse action procedures under section 7512. The removal was thus not a matter covered by section 7121(f), which effectively limits review of arbitration awards under sections 4303 and 7512 to the Federal Circuit. Accordingly, the unions exceptions were reviewable by the authority. *Army Reserve Personnel Center and AFGE*, 34 FLRA No. 61 (1990).

FLRA Reverses Award That Had Sustained Discipline of Union Official for Conduct While Engaging in Protected Activity

FLRA granted the union's exception to an arbitration award in a grievance over a reprimand issued to a union official. When the official served copies of unfair labor practices (ULP) charges on supervisors named in the charges, he refused to obey an order from a security police officer to leave. He left only after a second officer appeared. Nevertheless, management issued the reprimand for refusing to obey the initial order. The arbitrator denied the resulting grievance and found the grievant had invoked self-help rather than complying and grieving later. The authority decided that the official's misconduct had not been so flagrant that it removed him from the protection of 5 U.S.C. § 7102. His refusal to leave had not been impolite, antagonistic, or disrespectful. Because the arbitration award had sustained discipline for activity protected by section 7102, the award was contrary to law. FLRA vacated the award and sustained the grievance. *Air Force Logistics Command, Tinker AFB and AFGE*, 34 FLRA No. 72 (1990).

Allegation of Nongrievability Does Not Defeat Union Right to Information Under Section 7114(b)(4)

FLRA denied Fort Bragg's exceptions to an ALJ decision finding that management had violated 5 U.S.C. § 7116(a)(1), (5), and (8), by failing to provide the union a copy of the promotion file for a nonbargaining unit position. The union had sought the information in order to determine whether to file a grievance concerning Fort Bragg's allegedly improper ranking of an application from a bargaining unit employee. Management had denied release of the file, arguing that it was not necessary to collective bargaining under section 7114(b)(4) because the potential grievance over filling a nonunit position was nongrievable. The ALJ and the authority rejected that position. FLRA reaffirmed its earlier rulings that the possibility that a matter may not be grievable does not relieve an agency of its obligation to furnish the union information that is otherwise necessary for it to perform its representational functions. *HQ, XVIII Airborne Corps and Fort Bragg and AFGE*, 34 FLRA No. 79 (1990).

Arbitration

At the last Annual Symposium of the Society of Federal Labor Relations Professionals, an arbitrator, Charles Feigenbaum, commented on what he believed to be a waste of the taxpayers' money. Parties citing a case or statute to arbitrators often fail to provide a copy of the cited case or statute. This leads many arbitrators to travel "downtown" and spend a *billable* day to find the materials. Help your budget by providing photocopies of the precedent you cite.

The importance of stressing the facts of a case in arbitration cannot be overstated. Quite a few arbitrators are nonlawyers and share the general population's negative attitude toward technical, "legalistic" arguments. At the same time, do not hold anything back. Present all your meritorious claims, factual and legal, to the arbitrator. Try to persuade the arbitrator to rule for you. If you don't win there, your chances of prevailing later are statistically poor.

Equal Employment Opportunity Law

Disparate Impact

In *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990), a black employee alleged that an employment questionnaire had a disparate impact on blacks in violation of Title VII of the Civil Rights Act of 1964 and violated her constitutional right of privacy. Pursuant to a reorganization, the city government office in which Walls worked was transferred to the police department. As part of the transfer, all employees to be assigned in

the police department had to undergo a background check. The questionnaire for the background check required disclosure of criminal records of family members, homosexuality, marital history, and indebtedness. Walls was terminated from her position when she refused to complete the questionnaire.

Walls alleged disparate impact in that blacks were more likely to have adverse information in their responses to the questionnaire and therefore were more likely to receive unfavorable personnel actions as a result of the information. The court found that she did not establish a prima facie case of disparate impact. There was no evidence to support Walls' speculation that blacks would be subject disproportionately to adverse action. Applying *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988), and *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), the court held that Walls failed to show any causation between the alleged statistical disparity in the responses to the questionnaire and adverse action against any employee. Speculation concerning potential for disparate impact is insufficient proof.

Relying on *Bowers v. Hardwick*, 478 U.S. 186 (1986), the court held that Walls had no right to keep information about homosexuality private even though the relevance of the information to Walls' employment was uncertain. Information concerning criminal and marital histories was freely available in public records, so Walls had no reasonable expectation of privacy. Relying on *Barry v. City of New York*, 712 F.2d 1554 (2d Cir. 1983), the court held that although financial information is protected by a right to privacy, because of Walls' duties, the city had a legitimate need for the information that outweighed Walls' privacy interests.

Interest on Back Pay

We reported earlier that the Department of Justice Office of Legal Counsel had opined that agencies could not award interest on back pay remedies provided pursuant to Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. In February, 1990, EEOC requested the Attorney General to overturn the opinion of the Office of Legal Counsel.

EEOC takes the position, as supported by *Loeffler v. Frank*, 486 U.S. 549 (1988), that it has always had authority under Title VII to award interest, but could not do so before the 1987 amendments to the Back Pay Act, 5 U.S.C. § 5596, because of the government's general immunity from interest and the lack of an express waiver of that immunity. The Back Pay Act amendments constituted a broad waiver of immunity for any agency to award interest on back pay found to be due under any applicable law, rule, or regulation. Also, because EEOC is an "appropriate authority" under the Back Pay Act to determine unwarranted or unjustified personnel actions, it can require payment of interest.

DAJA-LE will keep you posted of any developments. In the interim, installations should not pay interest on awards for EEO complaints.

Civilian Personnel Law

MSPB Declines to Review Affirmative Defense of Discrimination in Removal based on Revocation of Security Clearance

MSPB joined two federal courts in applying the Supreme Court opinion in *Department of the Navy v. Egan*, 481 U.S. 518 (1988), to an appeal of a removal resulting from a security clearance revocation where appellant had raised Title VII defenses. The Army had revoked the clearance because of appellant's refusal to undergo a psychiatric evaluation to resolve allegations regarding questionable behavior patterns. In her appeal, appellant had alleged that the revocation/removal constituted illegal discrimination based on her sex, national origin, and age and was a reprisal for prior complaints, grievances, and whistleblowing. The board recognized that it would have to evaluate the Army's reasons for revoking the clearance in order to decide appellant's discrimination claims, a review precluded by *Egan*. Its review was thus limited to determining that appellant's position required a clearance, that it had been revoked, that appellant had received minimal due process, and that it was not feasible to reassign appellant to a position not requiring a security clearance. The board reviewed the feasibility of reassignment only because a local policy required the installation to make every effort to reassign an employee who loses a required security clearance. MSPB affirmed the initial decision sustaining the removal. *Pangarova v. Army*, 42 M.S.P.R. 319 (1989).

OPM Reconsideration of MSPB Decisions

Under 5 U.S.C. § 7703(d), OPM may petition the MSPB to reconsider a decision if the OPM Director determines that MSPB misinterpreted a civil service law, rule, or regulation and that the error will have a substantial impact of civil service law. In *Newman v. Lynch*, 28 GERR 312, the Federal Circuit Court of Appeals held that MPSB lacks authority to reject OPM reconsideration petitions on the grounds that the OPM director improperly made such a determination. If the director determines that an MSPB decision erred in the interpretation of civil service law and the error will have a substantial impact, MSPB must consider the substantive issues.

Whistleblowers

In its first decision interpreting the Whistleblower Protection Act of 1989, 103 Stat. 16 (1989), the MSPB has

very broadly construed the individual right of action stay provisions. In *Gergick v. GSA*, No. SL122190500305O030 (Feb. 28, 1990), the agency investigated possible misconduct by the employee that included insubordination, slanderous and defamatory comments about agency officials, and infringement of subordinate employees' privacy rights. The record of the investigation advised the employee that the apparent misconduct could result in disciplinary action. The employee filed a complaint with the Office of Special Counsel (OSC), alleging that the threatened disciplinary action was in retaliation for whistleblowing, exercising appeal or complaint rights, and refusal to obey unlawful orders. OSC declined to seek corrective action because there was insufficient evidence of a prohibited personnel practice. The employee then sought relief from the MSPB.

The MSPB reversed its administrative judge's denial of a stay of the threatened personnel action. Even though no disciplinary action had been proposed, the board held that the mention of possible discipline was a threatened action within the meaning of 5 U.S.C. § 2302(b)(8), as modified by the Whistleblower Protection Act. The record demonstrated that there was a substantial likelihood that the threatened action would constitute a personnel action within the meaning of 5 C.F.R. § 1209.5(a). The board defined "substantial" as something of real worth and importance, something more than seeming, imagery, or illusive. Next, the MSPB found that there was a substantial likelihood that the employee could show that his whistleblowing was a contributing factor in the threatened personnel action. The board noted that the investigation specifically referred to the employee's complaints to OSC and the agency's Inspector General. Finally, the record showed that there was substantial likelihood that the agency would not be able to present clear and convincing evidence that it would have threatened to take disciplinary action even in the absence of the employee's whistleblowing activity. There was no evidence on the record to support the agency's vague allegations of misconduct. The MSPB granted a stay of the threatened personnel action and asserted jurisdiction over the individual right of action appeal.

Health Benefits

Public Law 100-654, with implementing guidance in FPM Letter 890-40, provides temporary continuation of health benefits for former employees, children, and former spouses. Former employees involuntarily separated qualify for temporary continuation unless they were separated for gross misconduct. Gross misconduct refers to a flagrant and extreme transgression of law or established rule of action for which an employee is separated and concerning which a judicial or administrative finding of gross misconduct has been made.

Pursuant to the FPM letter, it is the employing office's responsibility to make an administrative determination of gross misconduct. Not all removals under adverse action procedures would constitute gross misconduct. Also, the gross misconduct must be the basis for the removal. If the agency determines that an employee was involuntarily separated for gross misconduct, it must provide due process specified in the FPM letter to deny continuation of benefits.

Labor counselors must be aware of and involved in the agency determination of gross misconduct. All determinations must be supported by the facts and applicable law. A former employee may file civil action to challenge a negative determination.

Criminal Law Division Note

Criminal Law Division, OTJAG

Supreme Court—1989 Term, Part II

Colonel Francis A. Gilligan
Lieutenant Colonel Stephen D. Smith

In *Baltimore City Department of Social Services v. Bouknight*[1] the Supreme Court held that the fifth amendment privilege against self-incrimination could not be asserted to resist an order to produce a child when that child had been placed in the care of its mother under the state's "child in need of assistance" program. Justice O'Connor, writing for a 7-2 majority, acknowledged that producing the child could be incriminating as "implicit communication of control ... [that] might aid the State in prosecuting"[2] the mother. Nevertheless, because the mother consented to certain responsibilities as a condition to having custody of the child, and because produc-

[1] 46 Crim. L. Rep. (BNA) 2096 (U.S. Feb. 20, 1990).

[2] *Id.* at 2097.

tion was "required as part of a noncriminal regulatory regime,"[3] the majority declined to permit the privilege to be invoked to resist a production order.

Maurice M. was an abused child, hospitalized when he was three months old with a fractured femur. Adjudicated a "child in need of assistance," Maurice was placed in the custody of his mother pursuant to a protective order. The mother specifically agreed to the terms of the order. Later, however, the mother breached the conditions of custody, failed to produce the child, refused to reveal the location of the child, lied about the child's location, and violated court orders to appear and produce the child at hearings. Ultimately, the mother was imprisoned for contempt until she either produced the child or revealed his location.[4] The issue presented was whether the contempt order violated the mother's fifth amendment privilege against self-incrimination.

The Court first clarified the nature of the protection provided by the privilege against self-incrimination. The fifth amendment protects only "testimonial communications." Therefore, a claim of privilege cannot be predicated upon "incrimination that may result from the contents or nature of the thing demanded."[5] The privilege exists, however, with respect to "implicit communication[s]"[6] within the act of production.[7] The Court noted that the mere existence of the privilege and the possibility of incrimination do not "justify invoking the privilege to resist production" under all circumstances.[8] Maurice's mother was prohibited from invoking the privilege for two reasons: 1) she agreed to conditions on her custody; and 2) production was "required as part of a noncriminal regulatory regime."[9]

These two reasons are not as distinct as they may seem at first blush. In undertaking to perform any regulated activity, it is arguable that one "agrees" to record keeping, production, and inspection as part of a public function.[10] Under this theory, the mother's submission to conditions on custody would alone be sufficient to overcome any claim of privilege. But listing "agreement" as the first reason for precluding the privilege is misleading. The fact of the matter is that the existence of a valid, "noncriminal" regulatory program is a condition precedent to any claim that the participant sacrifices any aspect of the privilege. Mere participation in the regulated program or activity is insufficient to bar a claim of privilege.

Justice O'Connor reviewed the Court's requirements for a valid regulatory regime. First, the program must carry out a legitimate public purpose unrelated to the prosecutorial enforcement of criminal laws.[11] The Court's second criteria is that there must exist a "sufficient" relationship between the government/public administrative objective and the interest to be fulfilled by requiring records and gaining access to the information or material sought.[12] Lastly, the Court requires that the disclosure/production requirements not be directed at a group inherently suspected of criminal activity.[13] If the program at issue fulfills these requirements, even if disclosure can be said to involve testimonial incrimination, then a claim of privilege will yield to the legitimate public purpose served by the regulatory program.[14]

The Court found that the Maryland "child in need of assistance" program justified precluding a claim of privilege against production because of the following factors: the child's "care and safety became the particular object of the State's regulatory interests"; the program was a "broadly directed, noncriminal regulatory regime"; enforcement was not sought against a "selective group inherently suspect of criminal activities"; the enforcement did not "focus almost exclusively on conduct which was criminal"; and production in most instances would not involve any incriminating testimonial act.[15] Despite the fact that the state indicated that the child might even be dead,[16] the Court concluded that efforts to gain production of an abused child under these circum-

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[3] *Id.*

[4] *Id.* at 2096-97.

[5] *Id.* at 2097.

[6] *Id.*

[7] The "verbal acts" doctrine as developed in military practice extends the application of article 31, UCMJ, to conduct that is a "speech analog." *See* Dep't of Army, Pam. 27-22, Military Criminal Law Evidence, para. 24-2b(1)(b)8 (15 July 1987).

[8] 46 Crim. L. Rep. at 2097.

[9] *Id.*

[10] *Id.* (citing Shapiro v. United States, 335 U.S. 1, 17-18 (1948)) (quoting Wilson v. United States, 221 U.S. 361, 381 (1911) (recordkeeping requirement "not for his private uses, but for the benefit of the public, and for public inspection").

[11] 46 Crim L. Rep. at 2097. Military practitioners will recognize this as the "administrative purpose doctrine" imbedded in our rules on inspections and inventories. *See* Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 313 [hereinafter MCM, 1984, and Mil. R. Evid., respectively].

[12] 46 Crim. L. Rep. at 2097 (quoting Shapiro v. United States, 335 U.S. 1, 32 (1948)).

[13] 46 Crim. L. Rep. at 2098.

[14] "California v. Byers, 402 U.S. 424 (1971), confirms that the ability to invoke the privilege may be greatly diminished when invocation would interfere with the effective operation of a generally applicable, civil regulatory requirement." 46 Crim. L. Rep. at 2098.

[15] *Id.* at 2097-98.

[16] *Id.* at 2097, 2099 (Marshall, J., dissenting).

stances were not primarily aimed at gaining some testimonial element of the act of production. The mother, therefore, could not avail herself of a claim of privilege to defeat production.

It is significant that Justice O'Connor's opinion specifically reserved the question of what use could be made of the communicative aspects of compelled production.[17] This is the only part of the majority opinion with which Justice Marshall evidenced any agreement,[18] and the reservation may have been necessary to obtain a clear majority under the facts of this case. The person who asserts the privilege, but nonetheless complies with the required production, may be protected at a subsequent prosecution. The majority opinion suggests that regulatory programs may contain "attractive and apparently practical"[19] subsequent use limitations. In any event, the fifth amendment itself may impose a bar to subsequent use without any statutory basis.

Because article 31, Uniform Code of Military Justice (UCMJ), "parallels" the constitutional privilege against self-incrimination,[20] the holding of *Bouknight* is applicable to military practice. The first significant parallel is the scope of coverage: "The privileges against self-incrimination provided by the Fifth Amendment to the Constitution of the United States and Article 31 are applicable only to evidence of a testimonial or communicative nature."[21] Second, testimonial or communicative aspects of some actions may fall within the coverage of article 31, UCMJ.[22] Finally, article 31 protections accorded to those who participate in regulatory programs which compel production of documents, information, or other materials are the same as those provided under the fifth amendment.

Military programs or regimes that have mandatory production as an element fall into one of two categories: 1) those in which the item or information sought is held in a representative capacity; and 2) those in which one holds the information in a personal capacity. In the former category, as a matter of case law the privilege against self-incrimination does not protect the individual from a valid regime's requirement to produce records or writings controlled in a representative capacity.[23] It would also follow that there would be no subsequent use limitation when records were held in a representative capacity. In the latter category, counsel and military judges should be guided by the analysis set forth by Justice O'Connor.[24]

The most recent military litigation on compelled production in an individual capacity involves the ration control system requirement to demonstrate proper disposition of controlled items—the so-called "show and tell" requirement. In *United States v. Williams*[25] a majority of the Court of Military Appeals held that United States Forces Korea Regulation 27-5 was "not unconstitutional per se and does not compel disclosures in violation of the Fifth Amendment or Article 31."[26] Adopting as correct the analysis of the Army Court of Military Review,[27] the majority expressed concern, however, that both production and nonproduction could have incriminatory implications. In his dissent, the Chief Judge echoed this concern and added that, as administered, the regulatory program is unconstitutional.[28] The Chief Judge also pointed out that *Bouknight*, which was pending before the Supreme Court at the time the Court of Military Appeals wrote its decision in *Williams*, could provide further guidance with respect to compelled production.[29]

The lawfulness of regulatory production schemes that carry out a program of public interest or concern seems settled. Where the program's primary purpose is admin-

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[17] *Id.* at 2099.

[18] *Id.* at 2102 (Marshall, J., dissenting) ("I take some comfort in the Court's recognition that the State may be prohibited from using any [testimonial conduct] ... in subsequent criminal proceedings.").

[19] *Id.* at 2099 (quoting Marchetti v. United States, 390 U.S. 39, 58-59 (1968)).

[20] United States v. Armstrong, 9 M.J. 374, 383 (C.M.A. 1980). *See also* United States v. Lloyd, 10 M.J. 172 (C.M.A. 1981).

[21] Mil. R. Evid. 301(a).

[22] *See, e.g.*, United States v. Corson, 39 C.M.R. 34 (C.M.A. 1968).

[23] *See* Mil. R. Evid. 301(a) analysis, app. 22, at A22-5; United States v. Sellers, 12 C.M.A. 262, 30 C.M.R. 262 (1961). While this rule is largely one of case law, it may also be viewed as an issue of standing. *See* Mil. R. Evid. 301(b)(1).

[24] For a discussion of government required record keeping and mandatory production, see E. Imwinkelried, P. Giannelli, F. Gilligan and F. Lederer, Courtroom Criminal Evidence § 1728 (1987 and Supp. 1989) [hereinafter Imwinkelried].

[25] 29 M.J. 112 (C.M.A. 1989).

[26] *Id.* at 113.

[27] United States v. Williams, 27 M.J. 710, 717-18 (A.C.M.R. 1988). The Army court used three criteria to assess the lawfulness of the compulsory production requirement: 1) whether the requirement exists in a noncriminal, regulatory area; 2) whether the requirement focuses on a select, suspect group; and 3) whether the requirement would force an individual to provide a significant piece of evidence establishing his own guilt.

[28] 29 M.J. at 121. *See also* United States v. Lee, 25 M.J. 457 (C.M.A. 1988).

[29] 29 M.J. at 121 n*.

istrative and the program is neither designed nor implemented to target a group or individual suspected of criminal activity, then production that furthers the legitimate purposes of the regulatory program may be compelled. A claim of privilege under either the fifth amendment or article 31, UCMJ, will not prevent production or sanctions to compel production. It remains to be seen, however, whether the testimonial aspects of such production may be used by the prosecution for any purpose at a subsequent criminal proceeding.

In *Maryland v. Buie*[30] the Court authorized "protective sweeps" incident to a warranted arrest. It defined a "protective sweep" as "a quick and limited search of a premises, incident to arrest ... to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding."[31] The Court held

> that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.[32]

On February 3, 1986, two armed men, one wearing a red running suit, entered a restaurant and committed a robbery. The same day the police obtained an arrest warrant for Buie and an accomplice. On February 5th, before executing the warrant at Buie's home, they called to see if he was present. Learning of his presence, six or seven officers proceeded to his house. Once inside, the officers fanned out through the first and second floors. Officer Rozar announced he would "freeze" the basement so that no one would come up and surprise the officers. With his pistol drawn he shouted into the basement ordering anyone down there to come up. Eventually the defendant emerged from the basement. He was arrested, searched, and handcuffed. Thereafter, another detective entered the basement to see if anyone was there. He noticed a red running suit in plain view on a stack of clothing and seized it. Rozar testified that he did not think he was in danger. The officer who entered the basement recognized that he could have reasonably looked in the already open basement to ensure that no one followed Buie to the stairwell to interfere with the arrest.

The Supreme Court rejected the standard of the State Court of Appeals that a protective sweep is permissible when the prosecution establishes probable cause to believe that "a serious and demonstrable potentiality for danger" exists.[33] The Court also rejected a general reasonableness balancing test before a protective sweep may be made.[34]

Buie presents a number of interesting issues with respect to military practice under the Military Rules of Evidence. These issues begin with the very basic question of whether *Buie*'s protective sweep rule applies to the military through the Military Rules of Evidence. Because the Military Rules of Evidence are silent on the lawfulness of protective sweeps, the "catch all" provision of Military Rule of Evidence 314(k)[35] will embrace the protective sweep. *Buie* clearly provides that the protective sweep, based on a standard of reasonable suspicion, is lawful under the Constitution. In addition, the protective sweep is a "search of a type not otherwise included in [Military Rule of Evidence 314] and not requiring probable cause under [Military Rule of Evidence] 315."[36] Therefore, this reasonable search, not requiring probable cause, meets the criteria of Military Rule of Evidence 314(k) and is applicable to the military. The second respect in which *Buie* is important to military counsel involves the scope of searches incident to apprehension under Military Rule of Evidence 314(g)(2).[37] Noting that protective sweeps were distinctly different from the conduct questioned in

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[30] 46 Crim. L. Rep. (BNA) 2132 (U.S. Feb. 28, 1990).

[31] *Id.* There is a question pending as to who is the subject of the danger. First, the Court said that a protective sweep must be necessary to protect the "police officers and others." *Id.* At another point, the Court focused on the danger to those on the arrest scene. *Id.* at 2134. Justice Stevens said that the protective sweep may be made to reduce the danger to the police officers themselves. *Id.* at 2135.

[32] *Id.* at 2134.

[33] *Id.* at 2133 (citing *State v. Buie*, 314 Md. 151, 165-66, 550 A.2d 79, 86 (1988)).

[34] 46 Crim. L. Rep. at 2133.

[35] Mil. R. Evid. 314(k) provides, "A search of a type not otherwise included in this rule and not requiring probable cause under Mil. R. Evid. 315 may be conducted when permissible under the Constitution of the United States as applied to members of the armed forces."

[36] Mil. R. Evid. 314(k).

[37] Mil. R. Evid. 314(g)(2) provides, "A search may be conducted for weapons or destructible evidence in the area within the immediate control of a person who has been apprehended. The area within the person's 'immediate control' is the area which individual searching could reasonably believe that the person apprehended could reach with a sudden movement to obtain such property; ..."

Chimel,[38] the Court indicated that "closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched" were subject to search by arresting officers without "probable cause or reasonable suspicion."[39] Such a search is a permissible "incident" of arrest and a lawful "precautionary" measure.[40] Whether this new "incident" of arrest applies to the military depends on the answers to several questions: 1) Did the Court establish a new type of lawful search within the "attack area"? 2) Did the Court merely expand the permissible scope of a search incident to arrest? 3) Is adoption of the "attack area" search precluded by the Military Rules of Evidence? 4) Should the general constitutional call for reasonableness permit adoption of the "attack area" search, despite specific rules within the Military Rules of Evidence.

If one views the "attack area" as a geographical expansion of *Chimel* beyond the area from which the arrestee might grab a weapon or destructible evidence, then this expansion may not apply to the military, absent exigent circumstances. Military Rule of Evidence 314(g)(2) establishes the scope of searches incident to apprehension, limiting the area to that in which the apprehendee could reach with a sudden movement to obtain a weapon or destructible evidence. Because of the specific definition in Military Rule of Evidence 314(g)(2), the "attack area" recognized in *Buie* may be beyond the scope of Military Rule of Evidence 314(g)(2). On the other hand, if the "attack area" search is a separate, lawful, less than probable cause search, then "attack area" searches, like protective sweeps, would be lawful in military practice by virtue of Military Rule of Evidence 314(k).

This problem calls into question the value of codifying "constitutional rules" as set forth in section III of the Military Rules of Evidence. Normal rules of statutory construction provide that the highest source authority will be paramount *unless* a lower source creates rules that are constitutional and provide greater rights for the individual. As applied to the Military Rules of Evidence, if a section III search rule is more restrictive of government conduct than Supreme Court constitutional interpretation, then the military should be bound by the more restrictive, constitutional, subordinate rule. It follows then that military trial and appellate courts should not be free to ignore the Military Rules of Evidence and adopt reasonableness as the standard for assessing fourth amendment conduct.

Despite the foregoing general rules of interpretation, this debate over the impact of the section III rules remains unresolved. Shortly after the Military Rules of Evidence were effective, the Navy-Marine Corps[41] and the Air Force[42] courts of military review came to opposite conclusions with respect to the force and effect of the rules of evidence. The Air Force court determined that it was not free to ignore specific Military Rules of Evidence and adopt broader, more flexible interpretations.[43] The Navy-Marine Corps court, on the other hand, concluded that broader constitutional rules could be applied to military practice, despite silence or specific restrictive Military Rules of Evidence.[44]

It is probably fair to say that since the effective date of the Military Rules of Evidence, the Court of Military Appeals has not felt constrained by the constitutional rules of evidence. In fact, some cases dealing with the fourth amendment simply gloss over or ignore the language contained within a Military Rule of Evidence,[45] implicitly following the Navy-Marine Corps Court of Military Review's logic. For example, in adopting the "totality of the circumstances" test for determining probable cause,[46] the Court of Military Appeals did not discuss the fact that the "two-pronged" test[47] was specifically embodied in Military Rule of Evidence 315(g) by Executive order.[48] That the drafters of the Military Rules of Evidence are not completely comfortable with the approach adopted by the Court of Military Appeals and the Navy-Marine Corps Court of Military Review is evidenced by the fact that the section III rules have been

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[38] Chimel v. California, 395 U.S. 752 (1969), involved conduct that the Court refers to as a "top-to-bottom" search. 46 Crim. L. Rep. at 2134-35.

[39] *Id.* at 2134.

[40] *Id.*

[41] United States v. Postle, 20 M.J. 632 (N.M.C.M.R. 1985).

[42] United States v. Johnson, 21 M.J. 553 (A.F.C.M.R. 1985).

[43] *Id.* at 556.

[44] 20 M.J. at 642-47.

[45] *See, e.g.*, United States v. Middleton, 10 M.J. 123 (C.M.A. 1981); United States v. Stuckey, 10 M.J. 347 (C.M.A. 1981); United States v. Acosta, 11 M.J. 307 (C.M.A. 1981); United States v. Bunkley, 12 M.J. 240 (C.M.A. 1982); United States v. Morrison, 12 M.J. 272 (C.M.A. 1982); United States v. Kozak, 12 M.J. 389 (C.M.A. 1982); United States v. Brown, 12 M.J. 420 (C.M.A. 1982); United States v. Alleyne, 13 M.J. 331 (C.M.A. 1982); Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983); United States v. Dulus, 16 M.J. 324 (C.M.A. 1983).

[46] Illinois v. Gates, 462 U.S. 213 (1983).

[47] *See* Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).

[48] United States v. Tipton, 16 M.J. 283 (C.M.A. 1983).

changed periodically to adopt new court interpretations and types of searches.[49]

While a full analysis of the wisdom of codified constitutional rules is beyond the scope of this article, *Buie*'s holdings highlight the problems of specific rules. Because we are now beyond the point of deciding whether we will have codified rules of criminal procedure, the unambiguous and constitutional Military Rules of Evidence should be followed. As such, it remains to be seen whether the "attack area" search is merely an expansion of *Chimel* beyond the scope of Military Rule of Evidence 314(g)(2) or whether "attack area" searches are a separate, reasonable search applicable to military practice through the "catch all" of Military Rule of Evidence 314(k).

In *Buie* the Court upheld a protective sweep in the arrestee's home following a warranted arrest. There are many variables to this factual scenario. 1) warranted arrest outside of the arrestee's premises; 2) warranted arrest outside a third party's premises; 3) warrantless arrest outside an arrestee's premises; 4) warrantless arrest outside a third party's premises; 5) warrantless arrest at arrestee's premises when the accused has been tricked to come outside; and 6) warrantless arrest at third party's premises when the accused has been tricked to come outside.

Assume there is reasonable suspicion to permit a protective sweep in all six factual situations. To permit protective sweeps in scenarios three through six without preexisting exigent circumstances would create the incentive for the police to avoid *Payton v. New York*[50] and *Stegald v. United States*.[51] These cases are based on the fundamental principle that, absent exigent circumstances, there is a preference for warranted arrests. *Buie* should apply to permit protective sweeps based upon reasonable suspicion in scenarios one and two, but the courts are split on how to handle the ploys used by the police to entice the suspects to exit their homes.[52]

The Court did not state what factors would constitute reasonable suspicion. Some factors to be considered are whether the location was a major narcotics distribution point,[53] evidence of other participants,[54] movements heard in other portions of the house,[55] where the sweep takes place (e.g., rural area versus city), and when it takes place (night versus day).[56] The last factor to be considered is whether the house had been under surveillance for a period of time and who was seen entering the house.[57]

Finally, *Buie* has no impact on the exigent circumstances[58] and hot pursuit doctrines.[59] Nor does it change the rules concerning what is seen in plain view[60] before the arrest or when an arrestee seeks to obtain wearing apparel or a change of clothing.[61] If there is a question as to the geographical limits, police officers should secure the premises, that is, hold it in a status quo,[62] rather than risking an illegal search.

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[49] For example, note the following rules of evidence, each of which is a change or an addition to section III of the Military Rules of Evidence, as originally prescribed in Executive Order 12198, 12 March 1980: Mil. R. Evid. 304(b)(2) (C2, 15 May 1986), and Mil. R. Evid. 311(b)(2) (C2, 15 May 1986) (adopting the inevitable discovery exception to the exclusionary rule set forth in Nix v. Williams, 467 U.S. 431 (1984), and United States v. Kozak, 12 M.J. 389 (C.M.A. 1983)); Mil. R. Evid. 304(h)(4) (C3, 1 June 1987) (clarifying the lawfulness of an order to produce bodily fluids in accordance with Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983)); Mil. R. Evid. 313(b) (changed by the 1984 Manual for Courts-Martial to eliminate a structured methodology for contraband inspections in accordance with United States v. Middleton, 10 M.J. 123 (C.M.A. 1981)); Mil. R. Evid. 314(f)(3) (added in the 1984 Manual for Courts-Martial to permit examinations of the passenger compartment of an automobile on less than probable cause in accordance with Michigan v. Long, 463 U.S. 1032 (1983)); Mil. R. Evid. 314(g)(2) (amended by the 1984 Manual for Courts-Martial to include the passenger compartment of automobiles within the scope of searches incident to apprehension in accordance with New York v. Belton, 453 U.S. 454 (1981)); Mil. R. Evid. 315(f)(2) (amended by the 1984 Manual for Courts-Martial to adopt the totality of circumstances test for determining probable cause in accordance with Illinois v. Gates, 462 U.S. 213 (1983)); and Mil. R. Evid. 316(d)(5) (added by the 1984 Manual for Courts-Martial to permit detention of property on less than probable cause in accordance with United States v. Place, 462 U.S. 696 (1983)).

[50] 445 U.S. 573 (1980).

[51] 451 U.S. 244 (1981).

[52] *Compare* United States v. Hoyos, 892 F.2d 1387 (9th Cir. 1989) (after warranted arrest outside of premises, protective sweep permissible when arrestees sought to alert others in the house and other accomplices were unaccounted for); United States v. Merritt, 882 F.2d 916 (5th Cir. 1989) (warranted arrest outside motel room, protective search of motel room rented by defendants known to carry weapons held to be permissible) *with* United States v. Curzi, 867 F.2d 36 (1st Cir. 1989) (ploy used to get suspect to open door thereby allowing warrantless arrests, protective sweep of premises held illegal).

[53] *See, e.g.*, United States v. Broomfield, 336 F. Supp. 179 (E.D. Mich 1972).

[54] *See, e.g.*, United States v. Williams, ___ F.2d ___ (8th Cir. Feb 8, 1990).

[55] *See, e.g.*, People v. Mack, 27 Cal. 3d 145, 165 Cal. Rep. 113, 611 P.2d 454 (1980); State v. Ranker, 343 So. 2d 189 (La. 1977).

[56] For a general discussion of factors that may be used to establish or negate reasonable suspicion, see Imwinkelried, *supra* note 24, at § 2005.

[57] *Cf.* United States v. Curzi, 867 F.2d 36 (1st Cir. 1989).

[58] Imwinkelried, *supra* note 24, at § 2052.

[59] *Id.* §§ 2024-2026.

[60] *Id.* § 2053.

[61] *Id.* § 2022.

[62] *Id.* §§ 1812, 2023.

In *United States v. Verdugo-Urquidez*[63] the Supreme Court, per Chief Justice Rehnquist, held that the warrantless searches of an alien's residences in Mexico by United States law enforcement authorities while the alien was in custody in the United States did not trigger the fourth amendment.

The fourth amendment provides "[t]he right of the people to be secure in their persons, houses, paper and effects, against unreasonable searches and seizures, shall not be violated." Who are protected persons? The majority in *United States v. Verdugo-Urquidez* indicated that the term "the people" is a term of art and "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[64]

In a curious concurring opinion, Justice Kennedy indicated that he agreed that no violation of the fourth amendment occurred. He could not, however, place "any weight on the reference to 'the people' in the Fourth Amendment as a source of restricting its protections."[65] Rather than restricting the fourth amendment protection, it may be language used to "underscore the importance" of the fourth amendment right.[66] To apply the fourth amendment warrant clause in this case would be "impractical and anomalous."[67] The absence of local judges to review probable cause, the uncertainty surrounding what search/privacy rules apply in Mexico, and our international obligations justify departure from the warrant clause.

The Court did not preclude a violation of due process in the future, nor did the Court indicate what might be required under our treaty agreements or what protections under the fourth amendment an alien might have in prison.[68] This case was argued in November and decided nearly two months after Operation Just Cause in Panama; as a result there is language in the opinion by Chief Justice Rehnquist aimed at the Noriega case:

> The United States frequently employs armed forces outside this country — *over 200* times in our history — for the protection of American citizens or national security. Congressional Research Service, Instances of Use of United States Armed Forces Abroad, 1798-1983 (E. Collier ed. 1983). Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest. Were respondent to prevail, aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters.
>
> Situations threatening to important American interests may arise halfway around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.[69]

Justice Stevens, concurring, stated, "I do not believe that the Warrant Clause has any application to searches of noncitizens' homes in foreign jurisdictions because American magistrates have no power to authorize such searches."[70] He also indicated that the historical discussion was simply irrelevant to the discussion on whether "an alien lawfully within the sovereign territory of the United States is entitled to the protection of our laws. Nor is comment on illegal aliens' entitlement to the protections of the fourth amendment necessary to resolve this case."[71]

The dissent pointed out that the Court has not clarified what is a sufficient connection to grant protections to aliens. The Court "hinted" that the alien must be "voluntarily" in the United States and accept "societal obligations."[72] The majority implied that if the alien's house was searched in the United States there would be fourth amendment protection.[73]

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[63] 46 Crim. L. Rep. (BNA) 2136 (U.S. Feb. 28, 1990) (Rehnquist, C.J., joined by White, O'Connor, Scalia and Kennedy, JJ.). Justice Kennedy wrote a separate concurring opinion. *Id.* at 2141. Stevens, J, concurring in judgment. *Id.* Brennan and Marshall, JJ., dissenting. *Id.* at 2142. Blackmun, J., dissenting. *Id.* at 2146.

[64] *Id.* at 2138. Justice Brennan, dissenting, states the majority "holds that respondent is not protected by the Fourth Amendment because he is not one of the 'people.' Indeed, the majority's analysis implies that a foreign national who had 'developed sufficient connection with this country to be considered part of [our] community' would be protected by the Fourth Amendment regardless of the location of the search." *Id.* at 2143 n.7.

[65] *Id.* at 2141.

[66] *Id.*

[67] *Id.* at 2142. Justices Stevens and Blackmun agreed that the warrant clause is inapplicable outside of the United States.

[68] *Id.* at 2140. "The extent to which respondent might claim the protection of the Fourth Amendment, if the duration of his stay in the United States were to be prolonged — by a prison sentence, for example — we need not decide."

[69] *Id.* at 2140-41.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 2143.

[73] *Id.*

The dissent also indicated that the "majority's doomsday scenario" of applying the fourth amendment to the United States Armed Forces when conducting a military mission is "fanciful."[74] Under these circumstances the dissent indicated that the emergency doctrine, or doctrine of exigent circumstances would apply.[75] Justice Brennan indicated that he does not agree with Justices Blackmun and Stevens, who believe that the warrant clause is not applicable overseas.[76] The dissent agreed that this may be true as a matter of international law, but cited the Army regulations that require warrants for wiretaps overseas.[77] None of the Justices cited the procedures in the Military Rules of Evidence for carrying out search warrants or search authorizations in foreign countries. The experience of the Army overseas has been that it is not impossible to have search warrants and search authorizations subsequently executed with the cooperation of the host country.

Justice Blackmun, dissenting, agreed with Justice Kennedy and with some of the language from Justice Brennan that when a foreign national is held accountable for a violation of U.S. criminal law, he or she is entitled to fourth amendment protections under the reasonableness clause.[78] Justice Blackmun indicated that he would remand the case for a determination of whether the search was based upon probable cause, a critical element of reasonableness.[79]

In *Butler v. McKellar*[80] the Court held that because *Arizona v. Roberson*[81] was not a new rule, it was inapplicable to cases on collateral review. The Court went on to indicate that *Roberson* is a prophylactic rule only tangentially related to the truthfinding process.

Death penalty cases are often based on specific statutory schemes or sentencing instructions and thus provide minimal direct guidance unless the military death penalty scheme suffers from the same defect. In *McKoy v. North Carolina*[82] the Court reversed a death sentence because a "unanimity requirement violates the Constitution by preventing the sentencer from considering all mitigating evidence."[83] The state sentencing scheme required the jurors to answer four issues sequentially: 1) Did they unanimously find, beyond a reasonable doubt, one or more enumerated aggravating circumstances? If yes, then 2) Did they unanimously find, by a preponderance of the evidence, one or more enumerated mitigating circumstances? If yes, then, 3) Did they unanimously find, beyond a reasonable doubt, that the mitigating circumstance[s] found by them is [are] insufficient to out-weigh the aggravating circumstance[s] they found? If so, then, 4) Did they unanimously find, beyond a reasonable doubt, that the aggravating circumstance[s] found by them is [are] sufficiently substantial to call for the death penalty when considered with the mitigating circumstance[s] found by them?[84]

Justice Marshall, who believes the death penalty is cruel and unusual under all circumstances, found that this case was controlled by the Court's decision in *Mills v. Maryland*.[85] A capital sentencing scheme that prevents even an individual juror from considering any or all mitigating evidence is unconstitutional. The majority in *McKoy* concluded that under the North Carolina scheme, jurors could reasonably conclude that they were precluded from considering any mitigating evidence not found to exist by all twelve jurors.[86] The fact that unanimity was required for aggravating circumstances as well as for mitigating circumstances did not save the North Carolina scheme.[87]

The death penalty scheme set forth in Rule for Courts-Martial 1004 does not suffer from the same defect as addressed in *McKoy*. After finding the existence of a specific aggravating factor unanimously and beyond a reasonable doubt,[88] "[a]ll members [must] concur that *any extenuating or mitigating circumstances* are substantially outweighed" by aggravating circumstances.[89] There is no limitation on what extenuating or mitigating circumstances may be considered by any court member. In fact, the very philosophy of the military capital sentencing scheme — "broad latitude to present evidence in extenuation and mitigation"[90]—encourages admission and consideration of all mitigating evidence.

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[74] *Id.* at 2145.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 2146 n.14 (citing Army Reg. 190-53, Interception of Wire and Oral Communications for Law Enforcement Purposes, para. 2-2(b) (3 Nov. 1986)).

[78] *Id.* at 2147.

[79] *Id.*

[80] 46 Crim. L. Rep. (BNA) 2165 (U.S. Mar. 5, 1990).

[81] 486 U.S. 675 (1988) (invocation of the right to counsel with respect to one offense precludes further government initiated interrogation, even about another offense).

[82] 46 Crim. L. Rep. (BNA) 2182 (U.S. Mar. 5, 1990).

[83] *Id.* at 2183.

[84] *Id.*

[85] Mills v. Maryland, 486 U.S. 367 (1989).

[86] 46 Crim L. Rep. at 2185.

[87] *Id.*

[88] MCM, 1984, Rule for Courts-Martial 1004(b)(7) and (c) [hereinafter R.C.M. 1004(b)(7)].

[89] R.C.M. 1004(b)(4)(C).

[90] R.C.M. 1004(b)(3).

Enlisted Update

Sergeant Major Carlo Roquemore

Experience

Introduction

This article addresses the subject of experience. You may recall that in an earlier article I mentioned "experience" as one of the components of career progression. One of the many definitions Webster gives for "experience" is, "Activity that includes training, observation of practice, and participation ...." I can best identify with that particular definition of "experience."

All of us come to the Regiment with some degree of experience. It may not have been related to legal and administrative matters, but much of it revolved around schooling, interaction with people and their attitudes and personalities, and many other related life experiences. Those experiences assisted us in developing some very basic skills, in terms of life's expectations.

By merging that prior experience with what the Army offers, we often find that we develop rather quickly and enhance those many basic skills learned earlier. A young, energetic person enters the military and is exposed rather quickly to people from many different geographical locations and cultural backgrounds. This sometimes results in apprehension. "Acclimation" and "congeniality" become the order of business for a smooth transition in a different environment. You complete basic training and shortly thereafter you find yourself in a rather demanding advanced individual training course. Remember the Legal Specialist Course conducted at Fort Benjamin Harrison, IN? As most will agree, the 71D AIT course is very demanding. Immediately, one must give undivided attention to the many meticulous details involved with the legal and administrative subject matters. You are constantly reminded that you are involved with a course of study that allows very little room for mistakes. You are told that you will become part of a team that will assist commanders and others in making very important decisions about the lives of soldiers and other individuals. These decisions may well have life-long impact. Pretty heavy stuff!

Solely from that point of view, adhering to our adopted definition of "experience," we must endeavor to get the best experiences available. We must hold ourselves and leaders accountable for those experiences. People rely on our services and deserve and desire the best we have to offer.

—Preparation and training for SQT and CTT is important.

—Understanding and being the total soldier is important.

—Understanding specialty tasks and standards is important.

—Seeking challenging and varied assignments is important.

—Knowing and understanding NCOES for career progression is important.

—Seeking professional development beyond normal duty hours is important.

In essence, being the best we can possibly be is important. The Army affords each of us an opportunity to work in that type of environment. It is an environment where "professionalism" is a resounding theme throughout one's military career.

After having completed the initial entry training, we embark on an exciting experience. For many 71D's, the initial assignment was to a battalion as a legal specialist. Remember the apprehension involved with tackling the many demanding tasks found at the battalion? My God! Wasn't that frightening? Many of us had no idea what to expect. But many of us had one important theme in mind: "Be All You Can Be." By combining experiences with those learned thus far in the military, we were able to ease many real and perceived moments of tension and apprehension. We discover who our assigned leaders are at the unit and duty assignment level; who has responsibility for sustained training; and what the tasks and standards are across the board. Soldiers must always understand the tasks and standards in order to accomplish the assigned mission. If not, confusion, wasted energy, and boredom results. That being the case, leaders have failed and we have set soldiers up for failure. Nothing could be more tragic for a young, conscientious, aspiring soldier.

Many of us were surprised to learn that we are soldiers with a particular specialty, that being a legal specialist was an aspect of soldiering, and that we are expected to soldier within the total context of soldiering. Remember common task training and testing? By combining skill qualification training with common task training and then helping to resolve real life legal problems for the command and others, we learned in short order that we gained a great deal of experience. Later, we also learned to develop a strong sense of confidence in ourselves and to

apply our skills. At this point, we should endeavor to enhance our skills by attending and participating in courses of study, both resident and nonresident.

As a legal specialist/NCO, court reporter, three of our most important resources are our ability to speak, write, and read. People must be able to understand what we are trying to convey. Decisions are based on clear and reliable information. Being the best we can possibly be requires us to recognize our individual weaknesses and do something to correct them. Your impact will depend on your credibility. If you master those three areas alone, believe me, it will add greatly to your skills and credibility as a soldier, leader, and adviser.

I urge you to take the resident and nonresident courses that will enhance your competence and proficiency and that will add to your expertise. Your chances for promotion and possible selection for more varied, responsible, and challenging assignments will be increased. Also remember: There are no bad assignments in the Army. My personal experience has taught me that those assignments considered undesirable by most soldiers usually offer the best opportunity for greater experiences and professional development.

Leaders, ensure your soldiers know and understand the NCOES. There are many functional courses available; discuss these at NCO professional development sessions. Be all you can be!

This article should be made available to every legal specialist/NCO and court reporter on active duty and in the Reserve components.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1990

June 4-8: 103d Senior Officer Legal Orientation Course (5F-F1).

June 11-15: 20th Staff Judge Advocate Course (5F-F52).

June 11-13: 6th SJA Spouses' Course.

June 18-29: JATT Team Training.

June 18-29: JAOAC (Phase IV).

June 20-22: General Counsel's Workshop.

June 26-29: U.S. Army Claims Service Training Seminar.

July 9-11: 1st Legal Administrator's Course (7A-550A1).

July 10-13: 21st Methods of Instruction Course (5F-F70).

July 12-13: 1st Senior/Master CWO Technical Certification Course (7A-550A2).

July 16-18: Professional Recruiting Training Seminar.

July 16-20: 2d STARC Law and Mobilization Workshop.

July 16-27: 122d Contract Attorneys Course (5F-F10).

July 23-September 26: 122d Basic Course (5-27-C20).

July 30-May 17, 1991: 39th Graduate Course (5-27-C22).

August 6-10: 45th Law of War Workshop (5F-F42).

August 13-17: 14th Criminal Law New Developments Course (5F-F35).

August 20-24: 1st Senior Legal NCO Management Course (512-71D/E/40/50).

September 10-14: 8th Contract Claims, Litigation & Remedies Course (5F-F13).

September 17-19: Chief Legal NCO Workshop.

3. Civilian Sponsored CLE Courses

August 1990

2-3: PLI, Bankruptcy Developments for Workout Officers and Counsel, New York, NY.

2-3: NELI, Employment Discrimination Law Update, Washington, D.C.

2-3: PLI, Management and Trial of a Medical Malpractice Case, New York, NY.

2-4: PLI, Acquisitions and Mergers, San Francisco, CA.

3: PLI, Real Estate Opinions Letters, New York, NY.

9-10: PLI, Accountants' Liability, San Francisco, CA.

9-10: PLI, Introduction to Qualified Pension and Profit Sharing, Chicago, IL.

9-19: NITA, Northeast Regional Program in Trial Advocacy, Hempstead, NY.

13-17: PLI, Basic UCC Skills Week, New York, NY.

15-17: ALIABA, Land Use Institute: Planning, Regulation, Litigation, Boston, MA.

16-17: PLI, Accounting for Lawyers, Los Angeles, CA.

16-17: PLI, Advanced Securities Law Workshop, Hilton Head, SC.

16-17: PLI, Creative Real Estate Financing, Chicago, IL.

16-17: PLI, Workshop on Legal Writing, New York, NY.

16-26: NITA, Rocky Mountain Regional Program in Trial Advocacy, Denver, CO.

20-21: ALIABA, Colorado Springs Tax Institute, Colorado Springs, CO.

20-24: ALIABA, The Emerging New Uniform Commercial Code, Palo Alto, CA.

23-24: PLI, Introduction to Qualified Pension and Profit Sharing, San Francisco, CA.

23-24: PLI, Workshop on Legal Writing, San Francisco, CA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1990 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 January annually
Arkansas	30 June annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually
Nevada	15 January annually
New Jersey	12-month period commencing on first anniversary of bar exam
New Mexico	For members admitted prior to 1 January 1990 the initial reporting year shall be the year ending September 30, 1990. Every such member shall receive credit for carryover credit for 1988 and for approved programs attended in the period 1 January 1989 through 30 September 1990. For members admitted on or after 1 January 1990, the initial reporting year shall be the first full reporting year following the date of admission.
North Carolina	12 hours annually
North Dakota	1 February in three-year intervals
Ohio	24 hours every two years
Oklahoma	On or before 15 February annually
Oregon	Beginning 1 January 1988 in three-year intervals
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Utah	31 December of 2d year of admission
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For address and detailed information, see the January 1990 issue of *The Army Lawyer*.

5. Indiana Attorneys—Take Note!

The Commandant, TJAGSA, recently received a letter from the Administrator of the Supreme Court of Indiana concerning certification of active law licenses. The Administrator noted the following:

> Over the last several years Indiana has received numerous requests to certify active law licenses to Bar Examiners in the District of Columbia and the State of Virginia. The requests are generated by

military lawyers approaching ETS. While most have maintained an active Indiana law license, many have not paid their annual disciplinary fee, opting instead to sign an affidavit indicating inactive practice. This causes trouble for these officers who seek to enter another jurisdiction on a foreign license, since some jurisdictions require an active license for five of the last seven years. If an inactive status has been maintained, a bar exam may face such officers.

....

While our Court will certify good standing for both active and inactive attorneys, if *asked*, it will indicate whether a license was active or inactive. Some jurisdictions want this specific information.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD B136337	Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-89-1 (356 pgs).
AD B136338	Contract Law, Government Contract Law Deskbook, Vol 2/JAGS-ADK-89-2 (294 pgs).
AD B136200	Fiscal Law Deskbook/JAGS-ADK-89-3 (278 pgs).
AD B100211	Contract Law Seminar Problems/ JAGS-ADK-86-1 (65 pgs).

Legal Assistance

AD A174511	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs).
AD B135492	Legal Assistance Guide Consumer Law /JAGS-ADA-89-3 (609 pgs).
AD B116101	Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).
AD B136218	Legal Assistance Guide Administration Guide/JAGS-ADA-89-1 (195 pgs).
AD B135453	Legal Assistance Guide Real Property /JAGS-ADA-89-2 (253 pgs).
AD A174549	All States Marriage & Divorce Guide/ JAGS-ADA-84-3 (208 pgs).
AD B089092	All States Guide to State Notarial Laws/ JAGS-ADA-85-2 (56 pgs).
AD B114052	All States Law Summary, Vol I/JAGS-ADA-87-5 (467 pgs).
AD B114053	All States Law Summary, Vol II/JAGS-ADA-87-6 (417 pgs).

AD B114054	All States Law Summary, Vol III/ JAGS-ADA-87-7 (450 pgs).
AD B090988	Legal Assistance Deskbook, Vol I/JAGS-ADA-85-3 (760 pgs).
AD B090989	Legal Assistance Deskbook, Vol II/ JAGS-ADA-85-4 (590 pgs).
AD B092128	USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
AD B095857	Proactive Law Materials/JAGS-ADA-85-9 (226 pgs).
AD B116103	Legal Assistance Preventive Law Series/JAGS-ADA-87-10 (205 pgs).
AD B116099	Legal Assistance Tax Information Series/JAGS-ADA-87-9 (121 pgs).
AD B124120	Model Tax Assistance Program/JAGS-ADA-88-2 (65 pgs).
*AD-B141421	Legal Assistance Attorney's Federal Income Tax Guide/JA-266-90 (230 pgs).
AD-B124194	1988 Legal Assistance Update/JAGS-ADA-88-1

Claims

AD B108054	Claims Programmed Text/JAGS-ADA-87-2 (119 pgs).

Administrative and Civil Law

AD B087842	Environmental Law/JAGS-ADA-84-5 (176 pgs).
AD B087849	AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs).
AD B087848	Military Aid to Law Enforcement/ JAGS-ADA-84-7 (76 pgs).
*AD B139524	Government Information Practices/ JAGS-ADA-89-6 (416 pgs).
AD B100251	Law of Military Installations/JAGS-ADA-86-1 (298 pgs).
*AD B139522	Defensive Federal Litigation/JAGS-ADA-89-7 (862 pgs).
AD B107990	Reports of Survey and Line of Duty Determination/ JAGS-ADA-87-3 (110 pgs).
AD B100675	Practical Exercises in Administrative and Civil Law and Management/JAGS-ADA-86-9 (146 pgs).
AD A199644	The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

Labor Law

*AD B139523	Law of Federal Employment/JAGS-ADA-89-4 (450 pgs).
*AD B139525	Law of Federal Labor-Management Relations/JAGS-ADA-89-5 (452 pgs).

Developments, Doctrine & Literature

AD B124193	Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B135506	Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).
AD B100212	Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).
AD B135459	Senior Officers Legal Orientation/ JAGS-ADC-89-2 (225 pgs).
*AD B140529	Criminal Law, Nonjudicial Punishment/JAGS-ADC-89-4 (43 pgs).
*AD B140543	Trial Counsel & Defense Counsel Handbook/JAGS-ADC-90-6 (469 pgs).

Reserve Affairs

AD B136361	Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966	USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 11-34	The Army Respiratory Protection Program	15 Feb 90
AR 25-55	The Department of Army Freedom of Information Act Program (This Regulation supersedes AR 340-17, 1 Oct 82)	10 Jan 90
AR 55-355	Defense Traffic Management Regulation: Transportation Facility Guide—Navy, Marine Corps, and the Coast Guard (Vol. 3)	15 Jan 90
AR 601-210	Regular Army and Army Reserve Enlistment Program	14 Feb 90
AR 608-10	Child Development Services	12 Feb 90
AR 700-20	Ammunition Peculiar Equipment (APE)	5 Feb 90
DA Pam 600-45	Army Communities	Oct 89

By Order of the Secretary of the Army:

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